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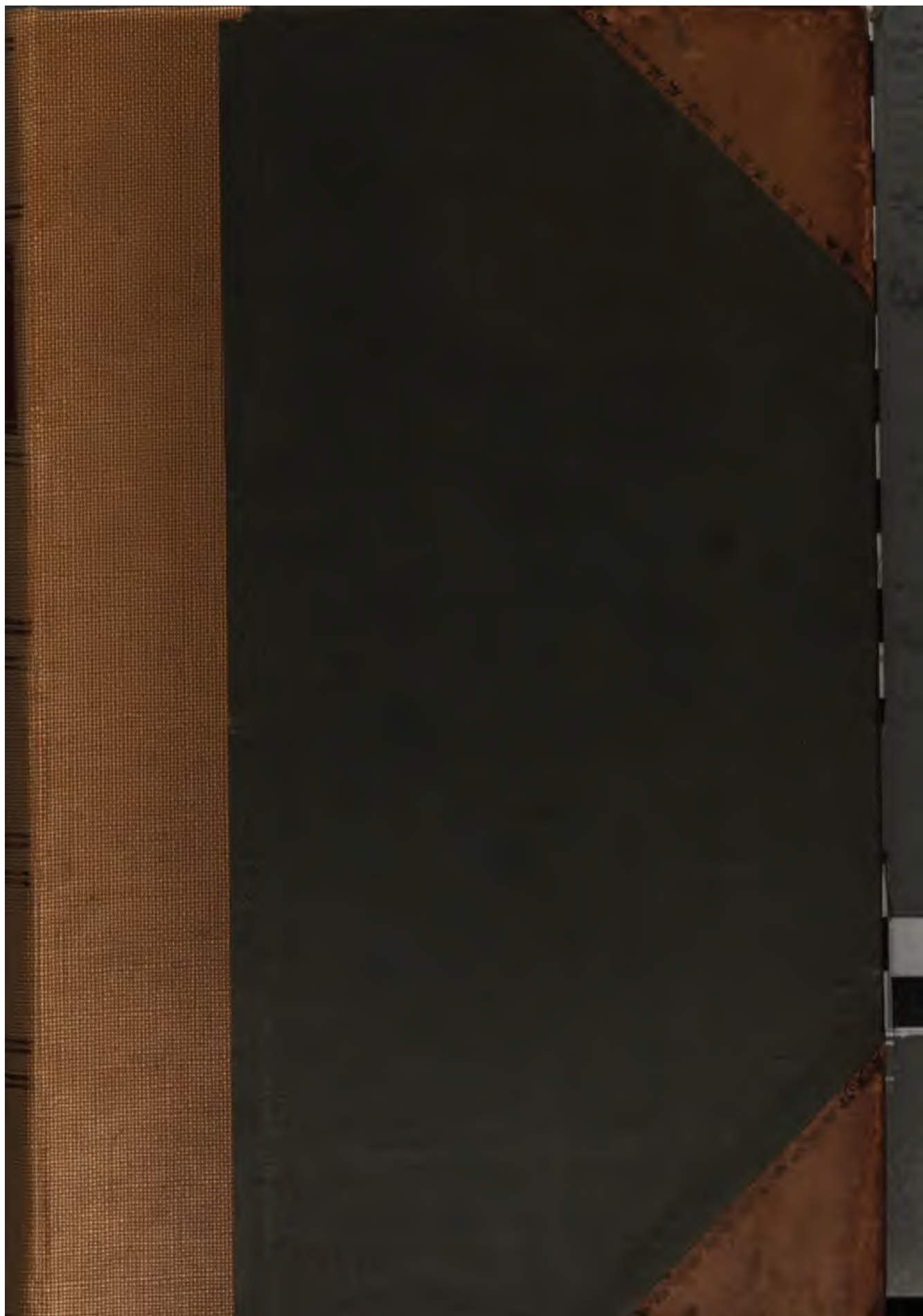
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REPORTS
OF
CASES
HEARD AND DECIDED IN THE
HOUSE OF LORDS
ON
APPEALS AND WRITS OF ERROR,
AND
CLAIMS OF PEERAGE,
DURING THE SESSIONS
1836, 1837, & 1838.

By **C. CLARK AND W. FINNELLY, Esqrs.**
BARRISTERS AT LAW.

VOL. IV.

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1839.



CHIEF JUDGES AND LAW OFFICERS
DURING THE PERIOD OF THESE REPORTS.

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HEARD IN THE
HOUSE OF LORDS,
ON APPEALS AND WRITS OF ERROR.

APPEAL

FROM THE COURT OF EXCHEQUER.

1836.

21 March.

JOHN SCARLET, EDWARD SCARLET, and }
JAMES PROUDMAN - - - - - } *Appellants.*

The Governors of the Free School in }
LUCTON, founded by JOHN PIERREPONT, } *Respondents.*

Where a grant from the Crown of tithes of a manor which formed part of a rectory, was ambiguous in its terms, but it appeared that the Crown had been possessed of the rectorial tithes—that the Crown had granted all it possessed—that the grantees had as such repaired the chancel of the church, and that the occupiers of lands within the manor accounted to the grantees for some of the tithes payable in respect of such lands, the Court of Exchequer refused to allow the occupiers to set up the non-perception of the other rectorial tithes in answer to a bill filed for an account of tithes. Nor would it allow such non-perception to be admitted as proof either of exemption of the occupiers of the lands from certain of the tithes claimed, or of the right of the vicar to the receipt of such tithes. And there being no other evidence offered, the Court decreed, an account. The House of Lords affirmed the decree.

The word “portionibus” is properly employed to mean a

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portion of the tithes of one parish claimed by the rector of another parish, and will not of itself be taken to have any other meaning.

IN this case a bill had been filed in the Court of Exchequer against the Appellants for an account of tithes alleged in the bill to be due to the Respondents, as the trustees of a charity founded by John Pierrepont in the year 1708, and confirmed by Act of Parliament. They claimed to be entitled to the improper tithes in the several townships of Luston, Eyton, Lucton, Bircher, and Yarpole, and in or within the manor of Luston in the county of Hereford, which formerly belonged to the abbot and convent of Reading in the county of Berks, when they were rectors of the rectory and parish church of Eye in the county of Hereford, and so continued to belong to them until the dissolution of the abbey, when the possessions of the abbey became vested by forfeiture in the Crown. The townships of Luston, Eyton, Lucton, Bircher and Yarpole, and the manor of Luston, are within the rectory and parish of Eye, as are also the vicarage of Eye, and the chapels and chapelries of Lucton, Eyton, and Yarpole. The Appellants, the defendants in the suit below, are the occupiers of lands within the township and manor of Luston. They admitted tithes of corn, &c. to be due to the plaintiffs in respect of the lands in question, but they denied that the Respondents had any claim to tithes of hay and agistment in respect of such lands.

It appeared from the admissions, and from the documents produced in the cause, that the abbot and convent of Reading were, from time immemorial, and up to the time of their dissolution, seised or possessed in their own right, or in right of their cell or priory

of Leominster in the county of Hereford, of the parish church of Leominster aforesaid, together with all churches and chapels thereto belonging, and particularly of the church and rectory of the parish of Eye in the county of Hereford; and that the rectory of Eye extended over the manor of Luston.

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The abbot and convent of Reading, after the church of Eye was appropriated to them, endowed the vicarage of Eye with both the great and small tithes of the township of Eye, properly so called, where the church is situate, and with the tithe of eggs only in the township of Luston.

In or about the 30th Henry 8th the abbot of Reading was attainted, and the abbey was dissolved, and the possessions of the abbot and convent, including the church and rectory of Eye, with all tithes thereto belonging, became vested in the Crown. The tithes in Luston, Eyton, Lucton, Bircher, and Yarpole, which had been parcel of the spiritualities of the late cell or priory of Leominster, annexed to the late monastery of Reading, were frequently demised to a family of the name of Croft, at will, for years, and sometimes for lives, during the reigns of Edward the Sixth and Elizabeth. The manor of Luston was also demised to the same family during parts of the same period.

King James the First, by letters patent, dated the 24th of March, in the tenth year of his reign, granted, *inter alia*, to Francis Morice and Francis Phelipps, gentlemen, in fee, "all those our tithes yearly and from time to time coming, growing, or renewing in Luston, Eyton, Lucton, Bircher, and Yarpole, or in any or either of them, in our county of Hereford, and in or within the manor of Luston, with all their rights, members, and appurtenances, in the said county of Hereford; and all those our tithes of all those lands,

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with the appurtenances there now or late in the several tenures or occupations of, &c. ; and also all those our tithes yearly and from time to time coming, growing, and renewing from all those lands, &c., in Eyton in our said county of Hereford, now or late in the several tenures or occupations of, &c. ; and all those our tithes in the marshes of Leominster in the aforesaid county of Hereford, that is to say, all those tithes of hay yearly and from time to time coming, growing, or renewing in Reading Hall, and the tithes of all those lands there, now or late of Albon Birch or his assigns ; and also all those tithes of hay there, now or late in the tenure or occupation of John Morice or his assigns ; and also all those our tithes of all those lands in Yarpool aforesaid in the said county of Hereford, now or late in the several tenures or occupations of, &c. ; and all those our tithes of all those lands in Bercher and Yerpool, or in either of them, in our aforesaid county of Hereford, now or late in the several tenures or occupations of, &c. ; and all those our tithes of all those lands in Lucton in our aforesaid county of Hereford, now or late in the several tenures or occupations of, &c. ; all and singular which premises are situate, &c., within the lordship of Leomynster, in the county of Hereford ; and were formerly parcel of the lands and possessions of the late cell or priory of Leomynster in the said county of Hereford, being a cell annexed to the late monastery of Reading in our county of Berks——. We have also given and granted, and by these presents do give and grant to the aforesaid Francis Morice and Francis Phelipps, their heirs and assigns, that they may from henceforth for ever have, hold, and enjoy, the aforesaid rectories, churches, tithes and hereditaments, as fully, freely, and entirely, and in as ample manner and form as any abbot or abbess or

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were proved to have been repaired by the Respondents and their predecessors.

The defence of the Appellants, as stated in their answer, was, that no tithes of hay or agistment, or any satisfaction in lieu thereof, except those already admitted, had ever, within the memory of any person living, been rendered or paid within such parts of the said rectory of Eye as were within the vicarage of Eye and manor of Luston, and insisted that at some former period or periods some body corporate, or person or persons having good right, title, and power so to do, executed some grants or grant, releases or release, by virtue whereof the tithe of hay and agistment, and of all other titheable matters and things within such parts of the rectory of Eye as were within the vicarage of Eye and manor of Luston, except as aforesaid, were granted or released unto, or became vested in the owners of the several farms and lands situate within such part of the rectory of Eye as are within the vicarage of Eye and manor of Luston, and had been enjoyed therewith. Evidence was called to make out this defence. The Lord Chief Baron, after time taken to consider, decreed (a) an account of the tithes of hay and agistment claimed by the plaintiffs in the suit. Against that decree the defendants brought the present appeal.

Mr. Boteler and Mr. Wigram for the Appellants:—
 The grant relied on by the Respondents is not a grant of rectorial tithes, but only of a particular portion of tithes. The tithes of hay, turnips, and potatoes, not in the ground, and the tithes of agistment, have never

(a) 2 Yonge & Jerv. 330.

been receivable by the Respondents. They belong either to the vicar of Eye or to the holders of the land there. The Appellants would also rely on the non-perception of these tithes in support of the claim of exemption, but that the case of *Andrews v. Drever*, recently decided in this House (b), establishes that non-perception alone cannot be relied on as a ground of exemption. The Appellants therefore go to another ground of objection, and contend that where the words of a grant are ambiguous, non-perception by the grantees becomes evidence to show in what way the grant ought to be construed. The charter of Henry I. to the abbot and monks of Reading, contained these words: "Et donavi eidem monasterio, &c. et Leominstria cum appendiciis suis, cum sylvis et agris et pasturis, cum pratis et aquis, cum molendinis et piscariis, cum ecclesiis quoque et capellis et cimeteriis et oblationibus et decimis." Now Luston was one of the sub-manors of Leominster, and Eye was appendant to the mother church of Leominster. Pope Nicholas' Taxation of the Diocese of Hereford fixes the value of Eye at 77 $\frac{1}{2}$ marks "cum portionibus," an expression also used in several documents both before and after that taxation. All these things show that the portions formed part of the calculation of Pope Nicholas' taxation, and that therefore the word "decimis" in the original grant meant parts disconnected from the rectory. If the abbey did not receive these tithes the grantee of the Crown cannot claim them. In later times the Ministers' Accounts show that all kinds of tithes were not received from these lands.—[Lord Cottenham, Lord Chancellor: But the great tithes are not included in those accounts. If the rectory belonged originally to

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(b) 3 Clark & F. 314.

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the abbey of Reading, the rectorial tithes must have gone on the suppression of the abbey to the Crown, and then they ought not to find their way into the Ministers' Accounts.]—The rectorial tithes have been split into parcels, and some may now be vested in the Crown. In the grant on which the claim of the Respondents is founded, the words are "*diversas decimas*," which clearly would not include all tithes; and that limited construction is shown to be still more correct when in the same document there is an express mention of the tithes of hay, which are the subject of a distinct grant. These tithes therefore must be taken as excluded from the operation of the general words. There is no mention in the grant of rectories or rectorial tithes, and the plaintiffs do not stand in the situation of rectors, and consequently are not entitled to the benefit of the presumption of law in favour of those to whom that character belongs. Their claim therefore must depend on the ambiguous words already quoted. Those words will not support it, especially when opposed to the usage of non-perception. The phrase, *omnes decimas nostras*, cannot have a universal application, when, by the words immediately following it, the tithes granted are described as issuing out of particular lands. The generality of the first is limited by the specialty of the second. The situation of the party using the words must be considered, in order to know what is the proper construction to put upon them, *Doe d. Jersey v. Smith* (c). There is on the face of the instrument itself a manifest ambiguity; for in the first place the Crown grants all the tithes, and then grants portions of them. Before putting on the words of the grant the construction contended for by the plaintiffs, the House must be satisfied that the rectorial

(c) 2 Moore, 339; 2 Brod. & Bing. 473; 3 Bli. 290.

tithes were possessed by the person making the grant. Now it is clear that there is an independent perception of some of the tithes, such as those of hay, by the vicar. The judgment in the Court below proceeds on the assumption that the Crown was the rector at the time of the grant. If so, and if the Crown intended to grant the rectory, why were not words used clearly to express such an intention? They were used with regard to the other rectories, about which there is no question, but in this single instance they are omitted, which is a strong fact to show that such a grant was not intended. The rule of law with respect to tithes is admitted to be different from that with respect to other property. But still a presumption of a grant of the tithes, or part of the tithes, to the holders of the lands may be made even in such a case. In *Norbury v. Mee* (*d*), that doctrine was established. That was a case in which lands, that had belonged to one of the lesser monasteries, were held not to be exempted as such from the payment of tithes in the hands of the grantees of the Crown, under the stat. 27 Henry 8, c. 20. At common law it has been held, that if such lands had been otherwise discharged of tithes, the discharge being terminated by the dissolution of the monastery, the right of the ecclesiastical rector revived; but as between two monasteries, the one holding an impropriate rectory, and the other the lands within the rectory, it was thought doubtful whether the same doctrine was applicable. But it was considered that the case there was not similar to a claim of exemption merely derived from a religious order, nor from unity of possessions, but that both bodies being capable of making an alienation, the monastery having the impropriate

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rectory might convey the tithes to the other body holding the lands. Such would be the case of a right of exemption by conveyance, and it was thought, therefore, that that was a title which admitted of proof by presumption. The appellants contend that this presumption ought to be made in the present case.

That case, however, goes still further, for it shows that upon a lease of tithes by a lay impropriator, if the tithes of particular lands are excepted, it may admit of the construction, that the lessor is entitled to that which he excepts. But if a former owner of the tithes upon a lease has made a parol declaration that he is not entitled to the tithes of those lands, that declaration is in itself important evidence, and gives a construction to the exception in the lease. The non-perception here is equivalent to such a declaration, and fairly gives rise to the presumption set up by the Appellants. There are other rectories in the same grant with respect to which no question can be raised, so that it does not necessarily follow that the rectory mentioned in the grant must mean the rectory of Eye. The defendants are not, under these circumstances, bound to show title in another; they have, both on the words of the grant and on the evidence of non-perception, as showing what has always been in practice the construction put upon the grant, impeached the title of the plaintiffs, and the decree which has been made in favour of the plaintiffs, calling on the defendants to account, must therefore be reversed.

Mr. *Tinney* and Mr. *Lowndes* for the Respondents:—The decree here is perfectly right. The original defence set up in the Court below by these Appellants was a *non decimando*; but *Andrews v. Drever* decided that such a defence could not be supported. That

defence failing, the defendants have no answer to the bill. The case of *Norbury v. Mee* will not support the object for which it is cited, for there is not in the facts of this case any such ground of presumption as existed there. It is said that the plaintiffs do not claim as rectors. The answer is, that the plaintiffs stand in the place of the Crown, and the Crown held the rectory before the grant. If the defendants cannot prescribe against the Crown, they cannot prescribe against the plaintiffs, who, being the grantees of the rectorial tithes, are entitled to the benefit of the same presumptions which exist in the case of rectors. There was no need to make an express grant by words of the rectorial tithes, for the grant is of all tithes in the manor of Luston, which being within the rectory of Eye, the tithes granted were necessarily rectorial tithes. By the terms of the grant nothing was reserved to the Crown, which granted all it possessed. But all the documents show that the Crown was possessed of all that had formerly belonged to the abbey, and, among the rest, of the rectorial tithes. If, therefore, it granted all it possessed, it must have granted these tithes. There is no clear title to these particular tithes shown in the vicar, and against all the other circumstances in the case a claim of that sort, merely from the alleged fact of non-perception, cannot in law be presumed. Now as to the grant itself, under which the plaintiffs claim, the general words of grant first used in it are not circumscribed by the particular words used afterwards, the latter only supply any accidental defect there may be in the former. The defendants admit themselves liable to pay to the plaintiffs some tithes, and they show no clear and undoubted ground of exemption with respect to the tithes now in question. The Crown could not set up an adverse title to the plain-

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tiffs. If not, no individual can. This view of the case was forcibly noticed by the Lord Chief Baron in the Court below. He said, (e) "It is plausibly contended, upon the construction of the charter of James, that the Crown thereby granted all the rectorial tithes of Yarpole. It is a strong argument in favour of that construction, that neither the Crown itself, nor any other grantee of the Crown, has ever set up an adverse title, nor in fact received one sixpence upon that footing." That reduces the case to one of a mere *non decimando*. Then that defence cannot be set up here, for that would be to make the wrongful subtraction of tithes a ground of legal exemption from liability. But even on the mere fact of nonpayment, the suits already instituted on this grant are an answer to that defence. On every view, therefore, which can be taken of this case the decree is right, and must be affirmed.

Aug. 19.

Lord Cottenham (Lord Chancellor):—This was a bill for tithes, filed by the present Respondents, the trustees of Lucton School, against persons occupying land within the manor of Luston, which forms part of the rectory of Eye. There was no question of the plaintiffs' right to receive the tithes of corn and other things of a like nature, but their right to receive the tithes of hay and agistment was disputed. The history of this property, and of the plaintiffs' title, is unfortunately involved in some obscurity. It appears that by the charter of Henry I. the monastery of Reading had a grant of the priory of Leominster, part of the possessions of which was the rectory of Eye. The title of the monastery under this charter to that

(e) *The Governors of Lucton School v. Scarlet*, 2 Yong. & J. 369.

rectory was confirmed upon a *quære impedit* in the 11 of Edward I. In Pope Nicholas' Taxation in 1291, there is a reference to the monastery of Reading and its various possessions, and in that document these words are used: "Prior. Leomin.—Ecclesia de Eye *cum capellis suis*." In the 3 Edward VI. there was a grant from the Crown to Sir James Croft, of the manor of Luston, "part of the possessions of the late cell of Leominster, and to the late monastery of Reading belonging, and all and singular messuages and tithes, &c., situate, renewing, &c., in Luston, &c., to the said manor of Luston belonging, tithes of corn, hay, &c., and other tithes whatsoever in Luston, &c., late parcel of the cell of Leominster," which the lessee was to hold in as ample a manner as the monastery had before held them. There is not a question but that the rectory of Eye had been part of the possessions of the monastery of Reading, and came with that monastery to be vested in the Crown. Then comes the question as to the mode in which the Crown dealt with it in a grant of the 10 James I., to two persons named Morris and Philips. The words in that grant are "all those our tithes yearly and from time to time coming, growing, or renewing in Luston, Eyton, Lucton, Bircher, and Yarpole, or in any or either of them, in our county of Hereford, and in or within the manor of Luston, with all their rights, members, and appurtenances." The grant describes them as "formerly parcel of the possessions of the late cell of Leominster in the said county of Hereford, being a cell annexed to the late monastery of Reading;" and it also grants all "those our tithes of sheaf, blade, grain, and hay, wool, flax, &c., and all other tithes whatsoever, as well great as small, and all oblations, obventions, payment for tithes, or in satisfaction of tithes, &c., coming, growing,

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renewing, or arising within the counties, cities, towns, fields, places, parishes, or in or within any or either of them, or elsewhere, wheresoever, to the aforesaid rectories, churches, prebends, &c., in any manner belonging, appertaining, incident, or appendant, &c.”

The whole question is upon the terms of that grant. In the extract from it which I have stated, it will be observed that it is a grant of the rectory, and the tithes of hay, &c. It was matter of observation at the bar that there were other rectories, with respect to which no question could be raised, also comprised in the same grant, so that it does not necessarily follow that this grant of the rectory should mean the rectory of Eye. But that part of the grant, with respect to which there is not any dispute, is, that it was a grant of all the tithes in Luston. The rectory of Eye was more extensive than the district of Luston, and that may explain why the grant, if it was intended only to comprise the tithes of the district called Luston, did not in express terms contain the rectory of Eye. From these two persons, who were the grantees in this case, is regularly derived the title of Mr. Pierrepont, who endowed the school, and under whom, by a conveyance regularly executed, the trustees of the school now claim. On the part of the defendants to the bill, (the present Appellants) the defence was, that the plaintiffs did not prove themselves to be in the situation of impropriate rectors of this rectory, that consequently they were not entitled to the benefit of the presumption of law in favour of such impropriate rectors; and it was contended that the plaintiffs could not call on the defendants to make payment of these tithes, without proving actual perception of them. It is certainly true that there is no proof of perception of these particular tithes for these particular lands.

But there is evidence to show that the defendants are liable to tithes for these lands, a fact which goes to prove that the grant comprised all the tithes of the rectory of Eye within the district of Luston. That evidence is, that the Respondents have received tithes, and have compelled the payment of these tithes from the lands in Luston. If, therefore, there was any ambiguity in the phraseology used in the grant, this fact would be legitimate evidence for the purpose of putting a construction on it. No less than five suits have been instituted among parties in the relative situation of these Appellants and Respondents, three of which more particularly apply to this question. There was a suit of *Penny v. Hoper* in 1721, in which there was a claim of the tithes of hay for these very lands in Luston; and by the decree of the Court of Chancery, the plaintiff there was declared to be entitled to them. There was another suit afterwards, of the *Attorney-General v. Keysall*, which is not very important on either side. There was then another suit of the *Attorney-General v. Stephens* in 1743, and though that did not lead to any decree, the pleadings show that payment of the tithes of hay in Luston was there sought, and that the defendant endeavoured to escape from payment, not from any defect in the title of the plaintiff, but upon the ground of an adverse title being vested in himself. The question in substance is, what is the effect of the grant? Did or did not the grant operate to convey the title to tithes in the district of Luston? I think that it did; and when we find that the parties claiming under the grant have not only obtained decrees against other persons for the payment of tithes of hay in Luston, but that these very defendants account to the plaintiffs for tithes of a more valuable description, held by the

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very same title, it appears to me that no reasonable question can be raised as to the effect of the grant, to convey to the grantees, and those who claim under them, a right to receive such tithes as were payable out of the lands in Luston.

In 1707 there was a lease from Mr. Pierrepont to Sir H. Croft, of the tithes in Luston, on condition of his repairing the chancel of the church, and evidence was given that the chancel had been so repaired by the plaintiffs' predecessors. If it was necessary to show the plaintiffs' right as rectors, the fact of their predecessors, and themselves since, having so received the tithes and repaired the chancel of the church, and that this obligation to repair appeared to vest so long ago as 1707, would be strong and cogent evidence of their right. The defendants admit that the monastery of Reading was, before the dissolution, possessed of the rectory of Eye, and that tithes of corn, &c. were payable in respect of that rectory to the monastery. But it is said that the plaintiffs are not now possessed of the rectory of Eye, and therefore are not entitled to the benefit of the presumption that must otherwise be made in their favour; and that though no deed can be produced to show that such was the fact, yet it is contended that as the manor and other lands were at one time in the possession of the Crown, it must be presumed that when the lands so vested in the Crown were conveyed to the grantees, these particular tithes were separated from the general tithes, and conveyed with them. That argument can hardly be adopted, even in a case in which the claim is for an exemption from tithes altogether, but certainly not in a case where the claim is only for a partial exemption from particular tithes. That would be to presume that the person in whom the title to the lands and the title to

the tithes had been vested, had conveyed, not the lands and the tithes, but only the lands and a particular description of tithes. I cannot recommend your Lordships to make such a presumption in the absence of all documentary evidence to justify it. The defendants are in possession of their own title deeds; they are not produced as evidence of such an unusual grant, but this House is asked to infer from the fact that the tithes of hay and agistment have not been paid for many years, that the lands are altogether free from liability to such payment. In order to raise the defence so set up, not of title in the defendants themselves, but of defective title in the plaintiffs, they have tried to prove that the Crown had not the tithes but only certain portions of the tithes in Luston; and in order to make out that proposition they have produced the Ministers' Accounts, which do purport to be accounts not of the tithes generally of the rectory of Eye, but of distinct portions of them, "*decimas de Eya cum capellis et portionibus*." The Accounts themselves are headed "*Ecclesia de Eya cum capellis*," and these words, especially the abbreviation, which is said to be "*portionibus*," are relied on. This phrase generally means a portion existent in another parish, but the defendants say that here it means only a portion of the tithes in their own parish. This, undoubtedly, has not been considered the legal use of the word *portionibus* up to the present time. Whether the plaintiffs are clearly entitled to the rectory under this grant, may, perhaps, be a matter of doubt. If it was necessary to come to a conclusion on this question, it might be somewhat embarrassing, but it is clear that the plaintiffs here derived their title from persons who received a grant from the Crown, which

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was possessed of the rectory, and that they took under a grant of all the tithes of Luston. If the rector himself claimed here, it is not disputed that he would be entitled, notwithstanding the fact that such tithe had never been paid, to payment of all the tithes which the owners and occupiers of lands in Luston could not prove to have been legally discharged. The same rule would hold good as to his lessee, if he had granted a lease of his tithes, and the lessee would be entitled to presumption in his favour, not as lessee, but as suing in the right of the rector, and therefore as having a title to all the advantages which belong to the rector. Here we have a case which shows that the plaintiffs, whether impropriate rectors or not, are beyond all question the purchasers or the grantees of the tithes of the impropriate rector. The defendants, to exempt themselves from payment of the tithes, must under such circumstances show a legal discharge, but cannot ask for a decree in their favour merely on account of tithes not having been paid. Something has been said here of the claim of the vicar, but in the first place that would obviously be inconsistent with the other parts of the case; and, in the second place, the answer to the attempt to set up that claim, is, that the defendants do not say that they are owners of the tithe of hay, but that that tithe is payable not to the plaintiffs, but to another person, namely, the vicar. If they had merely said the first, they must have shown that the tithe was not payable at all to the rector, but in one part they say that it is not payable at all, and yet in another part of the case they say that it is payable to the vicar, but not to the rector. In this case there is considerable evidence to show the general title of the plaintiffs, and to negative the defence

set up by the defendants, that the Crown had only a portion of the tithes of the land. As it appears to me, there is no evidence to impeach the plaintiffs' title.

The grounds on which I am of opinion that the plaintiffs are entitled, are, that they prove that the rectory had been in the Crown; they prove the grant from the Crown of all the tithes which the Crown had in Luston, and that they received tithe of a variety of titheable matter, and repaired the chancel of the church in consequence of receiving such tithe. On the other hand, the defendants do not show that they are discharged from the payment of these tithes. Lord Chief Baron Alexander, after taking time to consider this case when it came before him in the Court of Exchequer, gave a long and an elaborate judgment upon it, and came to the conclusion that the plaintiffs were entitled to have payment of the tithe of hay of the lands in question. I have looked into all the authorities, and I have attended with considerable care to the arguments that have been adduced at the bar of this House, impeaching the judgment of the Lord Chief Baron, and I think that they are not well founded, and that his judgment is correct. I shall therefore move that this decree be affirmed. This being a case in which the defendants were fully heard in the Court below on the question of title, and in which the Court below decided against them with costs, I shall move that the costs should follow the decree here affirmed. The costs to be taxed in the usual manner.

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Decree affirmed with costs accordingly.

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A P P E A L

FROM THE COURT OF SESSION.

HAMILTON *v.* LITTLEJOHN.

Appeal.
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Where a Respondent did not appear to support a judgment of the Court below, this House reversed such judgment, but did not give the Appellant the costs of the appeal.

Qu. ? Whether such costs might not be given in a case where there was ground to impute fraud on the part of the Respondent.

IN this case there had been an appeal to this House against a decree of the Lord Ordinary, affirmed by the Court of Session, under the following circumstances:—The Appellant, who was a Writer to the Signet in Scotland, had in the year 1810 purchased an estate called Kames, had paid part of the purchase-money, and had charged the payment of the remainder as a burden upon the estate. The Respondent became by assignment entitled to a portion of the unpaid purchase-money. In the year 1815 the Appellant became embarrassed and called his creditors together, and executed a deed of trust to secure them payment of their claims.

The objects of this trust-deed were expressly declared to be,—1st, For payment of the expense of management: 2ndly, For payment of a preferable annuity to Hamilton during his life: 3dly, For payment of the creditors, according to their respective

rights and preferences. And there was a special stipulation to the following effect:—"That although the trustee shall resign, or shall die, yet the trust shall noways cease or become void, but the trust-right, and the infestment to be taken in virtue thereof, and all that may follow thereon, shall stand and subsist as a security to the whole just and lawful creditors preceding this date, as well those that may herein be omitted as those that are herein stated." In like manner, in the event of the resignation or death of the trustee, provision was made for the appointment of a new trustee by the creditors in his stead.

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A deed, called in Scotland "a deed of accession," or ratification, was executed by the creditors.

By this deed of accession the pursuer's creditors, parties thereto, expressly ratified, approved of and confirmed the trust, in the whole heads, articles and clauses thereof, and consented that the same should take effect; and "bind and oblige us, and those who may hereafter have right to our respective debts, to conform thereto;" "and to the proceedings to be had in pursuance thereof, in every respect as we are severally concerned." "And further, we do hereby agree, covenant, and oblige ourselves, and those for whom we act respectively, that we or our constituents shall not raise, commence, or follow forth any action, suit, diligence, or execution," against the person or estate of the said James Hamilton.

A Mr. Campbell was the first trustee appointed to carry the provisions of the trust-deed into effect; but he resigned at the end of two years, and Mr. Thomas Wright, the brother-in-law of the Respondent, was appointed in his stead. Mr. Wright died in 1824, and several meetings of creditors took place, and a Mr. M'Rae was, by the creditors, confirmed in the

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appointment of factor, which had been given him by the trustee, and the creditors, from time to time, received the money accruing in the shape of rents, &c. from the estate. No new trustee had ever been appointed. The Respondent, however, took measures to enforce the discharge of her particular claim upon the estate by an action against the Appellant. This action was objected to, as contrary to the terms of the trust-deed and deed of accession. The Respondent insisted that the action was maintainable, as there was no subsisting trust or trustee acting under the trust-deed. The Lord Ordinary, in March 1833, heard the cause argued, and pronounced an interlocutor, declaring that the Respondent was bound by the terms of the trust, but found that "there is no subsisting trust or trustee acting under the trust-deed, and therefore repels the defence founded on the said trust." Both parties appealed to the Court of Session, which pronounced the following judgment:—"The Lords alter the interlocutor submitted to review, in so far as to delete therefrom the words 'subsisting trust or,' and vary the same in so far as now to find that there is no acting trustee—but, *quoad ultra*, adhere to that interlocutor, and refuse the reclaiming notes and decern, &c., reserving claims to expenses, and of process generally, for the decision of the Lord Ordinary." The Appellant applied for leave to appeal, but was refused, the Court seeming to consider that the decree was not a final decree in the cause. The Appellant therefore presented a petition of appeal to this House, and having obtained leave to appeal, the case was argued before Lord Wynford, who held the terms of the trust-deed binding on those who had executed it and those who claimed under them, and that the creditors must appoint a new trustee and

proceed under the trust-deed, but that no one among them could proceed to recover his own claim independently of that deed. The decree allowing of the action by the Respondent was therefore reversed. While that case was under appeal to this House, the Court in Scotland pronounced in another case between the same parties, arising out of a different assignment relating to the same property, the same decree as in the former case. The Appellant appealed against that decree. This second appeal now came on for argument.

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The Attorney-General (Sir *John Campbell*) appeared for the Appellant:—It is clear that, after the decision pronounced by this House upon the former decree, the present, which arises out of precisely the same circumstances, and embraces precisely the same point, cannot be discussed. The decree must be reversed. The only question, therefore, is a question of costs. It must be admitted that, generally speaking, costs are not given to an Appellant, but here the Respondent, by not entering into any terms of accommodation, even after the decision in this House was given, has compelled the Appellant to appear here, and has put him to needless expense. That expense ought to be made good to him. In *Kennedy v. Cumming* (a), this House made an order granting not only the costs of the appeal, but the costs in the Court below to the Appellant, and this was again done in *Habkin v. Hogg* (b), and in *Hamilton v. The University of Glasgow* (c). The course, therefore, now prayed for, though not usual, is not entirely new in practice.

(a) *Robertson's Appeal Cases*, 19. (b) *Id.* 147. (c) *Id.* 172.

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Lord *Lyndhurst* :—If we grant such an application as the present, it must be in consequence of the particular circumstances of the case. Where the other party had been guilty of fraud, this House would no doubt relieve against it. But here the Respondent has done nothing. She has relied on a judgment of a Court of competent jurisdiction. Had she not a right to do so? Of course that judgment must, under the circumstances stated here, be now reversed; but as to the application for costs, I should like to look into the cases cited before deciding on it, and see whether the course pursued in them did not depend on something peculiar to each.

No judgment was afterwards delivered, but the following order was entered on the Journals.

17 May 1836. The order recites the appeal, and then proceeds thus :—"To which appeal Miss Littlejohn has not put in her answer, though peremptorily ordered so to do. Counsel were accordingly called in, and no counsel appearing for the Respondent, the Appellant's counsel was heard to state and argue the case on behalf of the Appellant, and having prayed a reversal of the interlocutors complained of, the counsel was directed to withdraw, and on due consideration had this day of what was offered for the Appellant in this cause, It is ordered and adjudged that the said interlocutors complained of in the said appeal, be and the same are hereby reversed."—Lords' Journals for 1836, p. 201.

The judgment of the Court below was therefore reversed, but without costs.

A P P E A L

FROM THE COURT OF SESSION IN SCOTLAND.

1834.

21 March.

CHARLES FERRIER, Esq., Accountant
in Edinburgh, Trustee upon the
sequestrated Estate of JOHN WHITE,
late Merchant in Edinburgh - - } *Appellant.*

FRANCIS HOWDEN, Esq., and others,
Trustees of the Scottish Union In-
surance Company - - - - - } *Respondents(a).*

Where a case has been ordered by the Appeal Committee to
be argued before the House upon the question of the com-
petency of the appeal, the House may or not, at its discre-
tion, permit a reply.

*Appeal.
Practice.*

An appeal on a mere point of practice is not competent.

Where a Court has treated one of its own proceedings as
merely interlocutory and not final, that circumstance is
decisive of the nature of such proceeding.

ON the 5th of December 1831, the Appellant, with
concurrence of His Majesty's Advocate, raised a sum-
mons of ranking and sale, in the Court of Session in
Scotland, against W. C. C. Graham of Gartmore, and
his creditors, according to the usual forms practised in
actions of that nature.

Certain of the heritable creditors of the said W.
C. C. Graham gave in defences to this action. Those
creditors are Respondents to the present appeal.

After the summons in the ranking and sale had

(a) This case was accidentally omitted from its proper place in
the Reports of the year 1834.

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been raised and brought into Court, the Appellant presented a petition to the Second Division of the Court, praying for a sequestration of the rents of the estates, and the appointment of a judicial factor thereon; and the Court, on the 24th of December 1831, pronounced an interlocutor, sequestrating the estates, and appointing Mr. James Brown, accountant in Edinburgh, to be judicial factor thereon accordingly.

On the 7th of March 1832, the process of ranking and sale came on for discussion before the Lord Medwyn, Ordinary, who thereupon pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, repels the defences; sustains the pursuer's title to insist; sustains the libel; finds it relevant for the pursuer to prove *scripto* that the common debtor is bankrupt, and the creditors in possession, and the manner of holding of the lands and others libelled, and what feu and other duties, minister's stipend, schoolmasters' salaries, and other burdens do affect the same, and are payable furth thereof: finds it likewise relevant for the pursuer to prove *prout de jure* the rental and arrears of the lands and others libelled, and worth and value of the property thereof, and at how many years' purchase the same may be sold: grants commission to A. B., &c. to take the proof of the rental, at, &c.: assigns the said day, &c. for the pursuer proving the whole other points hereby admitted to his probation, and grants diligence against havers, &c.: nominates the Lord Ordinary himself in course to be ordinary to the ranking of the said creditors; as also assigns the second box-day in the ensuing vacation to the whole creditors to produce all their claims, rights, and diligences competent to them respectively against the bankrupt

or his estate, and that for the first term, with certification as in a reduction-improbation," &c. &c.

After this interlocutor was pronounced, a petition was presented, in the said process of ranking and sale, by certain annuitant creditors of Graham, praying for an interim warrant upon the judicial factor, to pay the petitioners certain sums in respect of their annuities. This was remitted by the Court to Lord Medwyn, the Ordinary in the action of ranking and sale, as being incidental to that process. It would otherwise have gone, as of course, to the junior Lord Ordinary. Lord Medwyn, after various proceedings in regard to that application, made avisandum therewith to the Lords of the Second Division.

Previous to the presenting of the above petition by these parties, a reclaiming note was presented to the Second Division of the Court by the defenders in the ranking and sale, Respondents in the present appeal, against the above interlocutor of the Lord Medwyn, Ordinary, of the 7th of March 1832; and upon advising the same, and hearing counsel thereon, their Lordships pronounced the following interlocutor:—
 “Edinburgh, June 2, 1832. The Lords having considered this reclaiming note, with the proceedings, and heard counsel thereon, remit to the Lord Ordinary to sist further procedure under the interlocutor complained of, and to hear parties on any question that may be raised under this summons.”

And upon the petition itself for the granting of an interim warrant, the Lords of the Second Division pronounced the following interlocutor:—“Edinburgh, 6th July 1832. The Lords, upon report of Lord Medwyn, having resumed consideration of the petition, with the proceedings, grant warrant in favour

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of the petitioners for payment to them of the interim sum of 669*l.* 11*s.* 5½*d.*, with interest on said sum from the 9th day of February last till payment; and refuse to the petitioners their further claims under the heritable bond of annuity assigned to them, and decern." The Judges of the Court below were unanimous in this opinion, and no leave to appeal was obtained. The Appellant however presented his first appeal to the House of Lords on the 12th of July 1832, against the interlocutor of the 6th of that month; and on the 23d of July 1832, he presented his second appeal against the first-mentioned interlocutor of the 2d of June 1832. The competency of the latter of these appeals was disputed. The subject was submitted to the consideration of the Appeal Committee, who thought that it was a matter which ought to be heard by one counsel on a side at the bar of the House. The question of competency arose upon the construction of 48 Geo. 3, c. 151, s. 15, by which it is enacted, that "no appeal to the House of Lords shall be allowed from interlocutory judgments, but such appeals shall be allowed only from judgments or decrees on the whole merits of the cause, except with the leave of the Division of the Judges pronouncing such interlocutory judgments, or except in cases where there is a difference of opinion among the Judges of the said Division." The section goes on with this proviso: "Provided, that when a judgment or decree is appealed from, it shall be competent to either party to appeal to the House of Lords from all or any of the interlocutors that may have been pronounced in the cause, so that the whole, so far as it is necessary, may be brought under the review of the House of Lords."

The Lord-Advocate (*Jeffrey*):—This appeal is not competent. The Act of 48 Geo. 3, c. 151, s. 15, was expressly intended to prevent appeals against merely interlocutory orders. A party is able to bring interlocutory judgments before the House only when the case has been finally decided, but that itself is a reason why he should not do so while it may still be considered pending in the Court below. The appeal against the order of June 1832 is not made competent by the judgment granting the interim warrant which has also been appealed. There is no pretence for saying, that the granting an interim warrant is a final judgment. The very term itself, used to describe the warrant, shows the judgment not to be final in its nature or effect. If that is so, then that judgment cannot be considered one which may be appealed against, and which being so appealed against, will enable the party appealing to bring all interlocutory proceedings into discussion under that appeal. The granting of the interim warrant was a mere interlocutory relief, and had it been improperly granted, as it was a matter of practice in the Court, the error could have been set right by the Court itself. But it should be recollected, that it is not the interlocutor granting the interim warrant which is now the subject of discussion, the question is on the competency of the appeal against the order of June 2. Now that interlocutor is clearly not a final judgment, but an order to stay further proceedings in one part of the suit, and to proceed with them on another. The order of July was a mere order made in the course of a cause, and the preliminary judgment of June showed the clear intention of the Lords of the Second Division to remit the consideration of the cause upon its merits to the

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Lord Ordinary. This proceeding of the Lords of the Second Division is decisive of the point now in dispute. The question whether a judgment in a particular court is a final or merely an interlocutory judgment, is a question of practice which the Court itself is alone able to decide. In this case the Lords of the Second Division have decided it, for they have treated the judgment, of the Lord Ordinary as merely interlocutory. That character, in fact, belongs to all the orders that have been made in this cause. The appeal must consequently be held to be irregular, and as it has been brought without leave, and when no difference of opinion existed among the judges of the Court below, it must be dismissed with costs.

Dr. *Lushington*, in support of the competency of the appeal:—The simple question now is, whether any judgment, however final in its nature and effects, can be made the subject of an appeal if it is not in form, the judgment putting an end to the suit. It is submitted, that there are judgments not absolutely the final judgment in a cause, which may be made the subject of appeal, and that the order now appealed against is one of that sort. An appeal will lie when there has been a judgment which is in its nature final on any particular point in the cause, or when it is final on the whole cause. Both these circumstances exist with respect to the present case. There was a claim of ranking and sale by certain creditors. The Lord Ordinary, on the 7th of March 1832, gave a judgment, which was in substance and effect a final judgment. He sustained the libel, he repelled the defence, and he ordered accounts. Then came the judgment of the Court in June 1832, which

was in effect a reversal of the previous judgment, as it commanded an absolute stay of proceedings. But even if that judgment could not be considered final, the judgment in July was so. It granted the prayer for the interim warrant; it therefore awarded as it were an execution. In every respect that was a final judgment, and gave the party aggrieved a clear right of appeal. If so, then, by the very terms of the Act, he is entitled to bring under the consideration of the House all the interlocutory judgments previously delivered in the course of the case, and thus the judgment of the Court in June is properly subject to discussion.

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The *Lord Advocate* was about to reply.

Dr. *Lushington* objected, that there was no reply permitted on petitions for leave to appeal.

The *Lord Advocate* submitted, that though there might strictly be no reply on petitions of this kind, still the House might grant the opportunity of some observations being made; and the more so as the question was referred to their Lordships by the Appeal Committee, and the Lords were called upon to lay down a rule on the great charter of Scotch jurisprudence.

Lord *Wynford* assented, and

The *Lord Advocate* was permitted to proceed:—
 To sist a proceeding is to stay a proceeding; but staying it does not necessarily mean putting the parties out of Court. It is every day's practice in all Courts to make interlocutory orders to stay certain of the

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proceedings till a particular thing has been done ; as, for instance, staying a trial till the arrival of a witness ; and yet no one would contend that an order of that sort amounted to a final judgment. Here it is perfectly clear that the Lords of the Second Division meant to remit to the Lord Ordinary to hear the case on its merits ; and consequently their judgment cannot be made the subject of an appeal, for it is not final.

Lord *Wynford* :—As the Committee of Appeals felt some doubt on this question, I shall take time to consider it.

Friday,
 March 25.

Lord *Wynford* :—This is a question of practice, and that fact decides the case ; for I really do not know how this House can feel itself competent to say, upon a mere matter of practice, that the Judges of the Court below have done wrong. Those Judges are the best authorities to decide what is to be done in their own tribunal on matters of practice. There is no point of practice in any Court in Westminster Hall from which an appeal would lie to a superior court or to this House (*b*). The Judges of each Court are the final Judges of their own rules of proceeding : no appeal can be made against them, and it is most convenient that it should be so. If a writ of error was to be allowed from any court in Westminster Hall upon a point of practice, all the time of the superior courts would be wasted on subjects on which, after all, they might be obliged to say, “ We know nothing about the matter.” The objections taken in

(*b*) *Mellish v. Richardson*, 1 Clark & F. 224.

this case seem to have been considered in the Court below a matter so common, that in giving judgment the Court did not deem it necessary to give reasons for the judgment. On other occasions, in a matter of law, a Court is bound to state its reasons, but is not bound to do so in matters simply relating to its own practice. I think, therefore, that this appeal against the interlocutors of June and July 1832 is not competent; but as I have looked into the case itself, I may perhaps save future expense by intimating my opinion upon it. His Lordship then went through the several objections raised in the case, and moved that the appeal be dismissed with costs.

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Appeal dismissed accordingly.

A P P E A L

FROM THE COURT OF SESSION IN SCOTLAND.

1836.
May 17, 18, 19.

Sir WINDHAM CARMICHAEL ANSTRUTHER, }
Bart. - - - - - } *Appellant.*

Mrs. MARIAN ANSTRUTHER - - - - - *Respondent.*

An heir of line taking an entailed estate upon his father's death, cannot by the law of Scotland claim his share of his father's personalty as next of kin without first collating the entailed estate, though the entail was not created by his father, but by a more remote ancestor.

*Collating of
Real and Per-
sonal Estate.*

—◆—

THE late Sir John Carmichael Anstruther, the nephew of the Appellant, being the son of his elder

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brother, was born on the 6th of February 1818, and died in pupillarity on the 31st of October 1831. He was an only and a posthumous child; and was in possession, as heir of entail, from his birth, of the entailed estates of Carmichael, Anstruther, Newark and Mauldslie.

The estate of Carmichael he held under a strict entail, executed by John third Earl of Hyndford, dated 27th October 1757, and recorded in the register of tailzies 22d June 1762, containing, in the course of a long destination, a substitution in favour of Sir John Anstruther, the claimant's father, and the heirs male of his body. The lands and barony of Anstruther he held under an entail by the late Sir John Anstruther, the claimant's grandfather, dated 18th February 1778, and recorded in the register of tailzies 10th March of that year; under which that estate was destined, after previous substitutions, to the Appellant's father, and the heirs male of his body, in fee. The lands of Newark were possessed under a more recent entail, dated 7th December 1811 and 20th June 1812, and recorded 15th January 1813, executed by the trustees of Sir John Anstruther, the entailer of the last-mentioned estate, conveying the lands and lordship of Newark to the Appellant's elder brother, and the heirs male of his body; whom failing, to the Appellant, and the heirs male of his body; whom failing, to the substitutes called by the entail of Anstruther. Lastly, the lands and barony of Mauldslie were held upon a separate deed of entail, dated 3d, 13th, and 27th June 1791, and registered 16th June 1820, by which the trustees of John third Earl of Hyndford, conveyed that estate to Thomas Earl of Hyndford, then heir in possession under the Carmichael entail; whom failing, to a variety of

other substitutes; whom failing, to Sir John Anstruther, the Appellant's father, and the heirs male of his body; whom failing, to the substitutes called by the entail of Carmichael. The whole of these estates were thus settled in strict entail, with the necessary clauses, prohibitory, irritant and resolute.

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Sir John Carmichael Anstruther had completed his titles by service in special, as heir male of tailzie and provision to his father, in these estates. He possessed in fee simple certain other lands, inherited directly from his father, worth about 2,000*l.* or 3,000*l.*

From the large revenues of these estates, there had been accumulated, during the pupil's minority, a sum exceeding 60,000 *l.*, which stood vested partly in Government stock, and partly in personal, and partly in real securities, taken generally to Sir John Carmichael Anstruther, his heirs and assignees.

The Appellant and his sister, Mrs. Marian Anstruther, were the pupil's next of kin. The Appellant was also the pupil's heir of line. Further, he was heir of tailzie and provision, under the substitutions of the entails of Carmichael, Anstruther and Mauldslie, to Sir John Anstruther, the father of the claimant, and the heirs male of his body, and under the substitution in the entail of Newark, directly in favour of the Appellant himself, failing his brother and the heirs male of his body. The Appellant had regularly completed his titles to those different entailed estates, as heir of tailzie, under all these different entails.

In these circumstances, a question arose between the Appellant and his sister, Mrs. Marian Anstruther, being the next of kin, with respect to the moveable succession of the deceased; Mrs. Anstruther maintaining, that before the Appellant could share with her in that moveable succession, he must collate not only

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all that he had taken by fee-simple titles, and as heir of line to his nephew, but likewise his whole interests in the different estates to which he had succeeded as heir male and of entail, under the various entails already referred to; while the Appellant, on the other hand, maintained that he was entitled to his equal share of the moveables, without being bound to collate his right and interest in those entailed estates, but on condition merely of collating such heritage as he might have succeeded to by fee-simple titles, and as heir of line to the pupil.

The case came in the course of the rolls before Lord Medwyn as Ordinary, before whom the prefixed record was made up in the usual form by the claimants respectively; and the cause having been afterwards debated, his Lordship ordered cases, and, on 5th July 1833, made avisandum to their Lordships of the Second Division.

Their Lordships afterwards, on 28th November 1833, pronounced the following interlocutor:—"The Lords, on report of Lord Medwyn, Ordinary, having considered the cases for the parties, and whole proceedings, find, that in this process of multiplepoining, the claimant, Sir Windham Carmichael Anstruther, cannot claim any share in the executry of the late Sir John Carmichael Anstruther, without previously collating the heritage to which, as heir of Sir John, he has succeeded: Find Mrs. Marian Anstruther and her husband entitled to expenses of process, and remit to the Lord Ordinary to proceed accordingly."

The Appellant presented an appeal against this interlocutor, which was heard before this House, on the 14th and 15th of April 1835, and the following judgment was, of that date, pronounced:—"It is declared by the Lords spiritual and temporal in Par-

liament assembled, That this House (by consent of parties) forbears *hoc statu* to pronounce any decision upon the matter of the said appeal; but it is ordered and adjudged, That the cause be remitted back to the said Second Division of the Court of Session, with an instruction to the Judges of that Division to order the matter of law in question, in this cause, to be heard before the whole Judges, including the Lords Ordinary, and to pronounce judgment according to the opinions of the majority of such whole Judges."

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The case having been thus returned to the Court of Session, parties were heard before the whole Judges, and the following interlocutor, of 20th June 1836, was pronounced :—"The Lords, in pursuance of the order of the House of Lords, having heard counsel, &c., find, that the claimant and petitioner, Sir Windham Carmichael Anstruther, bart., cannot claim any share in the executry of the late Sir John Carmichael Anstruther, bart., without previously collating the heritage, to which, as heir of Sir John, he has succeeded: Find Mrs. Marian Anstruther and her husband entitled to the expenses of process, and remit to Lord Jeffrey, as Ordinary, in the place of Lord Medwyn, to proceed accordingly."

The case was again brought up by appeal to this House.

The *Attorney-General* and Mr. *Rutherford* argued the case on behalf of the Appellant; Sir *W. Follett* and Dr. *Lushington* were heard for the Respondent.

The arguments and the cases referred to are fully noticed in the judgment.

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Tuesday,
Aug. 16.

Lord *Cottenham* (Lord Chancellor):—This was an appeal from the Court of Session, in Scotland, intended to bring under the consideration of your Lordships the question, whether an heir of entail, being also heir of the line, was bound by the law of Scotland to collate or bring into account the value of the real estate to which he had succeeded, before being entitled to claim the share of the personalty of the deceased. In this case, from the careful accumulations of a long minority, the personal estates are considerable, while the heritable estate is comparatively small. By a decree of the 28th of November 1833, the Lords of the Second Division of the Court of Session declared, that the heir of entail must collate the real estate before he could take any benefit from his share of the personal estate. That decree was appealed from, and in April 1835 this House forbore, *hoc statu*, to give any judgment on the case, but directed the case to be remitted to the Court of Session, with an instruction to have it argued before the Judges of all the Divisions of that Court, including the Lord Ordinary, and to pronounce judgment according to the opinion of the majority of the whole. The cause was accordingly argued in the way directed, and on the 20th January 1836 the Court pronounced unanimously the same decree as before; and this House has been favoured with the written opinions of all the Judges. The present appeal has been since brought. The case below proceeded chiefly on the authority of a case known as *Little Gilmour's case* (a), and that case, which declared that the heir must collate the real before being allowed to share in the personal estate, has been cited as a

(a) 13 Dec. 1809, Fac. Coll.

decisive authority in the arguments at the bar of this House. Without admitting that the functions of this House are in the least possible degree restricted by the authority of Little Gilmour's case, I am ready to acknowledge, that that case, having been for many years acted upon as law, and a long course of decision and practice having been founded upon it, the House ought to pause long before overturning it. With these feelings I have entered upon the consideration of this case, and, after a careful examination of all the authorities, I am glad to say, that I do not think we are called upon to perform the distressing duty of overturning a long established and long recognized authority. It appears to me, upon a full review of all the Scotch law authorities, and of all the principles of that law which bear upon the present case, that the case of Mr. Little Gilmour, in 1809, was rightly decided, and forms, therefore, the clear and unquestionable declaration of the law of Scotland. It being admitted from the first that the case of Little Gilmour is identical with the present, and that the subsequent decisions of the courts of Scotland, and the recognized practice of the law there, have been in conformity with that case, the only question was, whether that case itself was so opposed to former decisions, and to the established principles of the law of Scotland, that the House was bound to overrule it. It is admitted by the Appellant, that, as a general proposition, the heir must collate whatever heritage he takes from a deceased person, before obtaining a share of the personalty of the deceased: but it is contended by him, that in a case like the present, of strict entail, he does not take from the deceased, but from the creator of the entail; and that he is not, therefore, compellable to

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collate such entailed estate, when he claims in common with another, who is also next of kin to the deceased, his share of the personal estate of the deceased. The ground on which that argument is put is, that the deceased did not have the power of diverting from him any portion of the entailed estate, over which the deceased had no power whatever; and that he owes nothing to the deceased's forbearance, or to his generosity. This argument is raised to show the absurdities that might, in some cases, flow from the application of the rule in *Little Gilmour's* case; and it would be entitled to great weight, in considering the propriety of establishing a new rule, but it is not of equal weight in considering the propriety of overturning a rule already well established, and constantly recognised. To all codes of law, instances of absurdities in particular cases, flowing from the application of any general rule, might no doubt be shown; but such instances cannot be allowed to defeat a well-known rule, that has been for a long time fully acted upon. Before considering the case itself, I will call the attention of your Lordships to the question, whether the rule of law now spoken of applies to strict entails? The Act of 1685, after giving authority to persons to create estates tail, and forbidding the heirs of tailzie to alien, goes on to say, that in such case "the next heir of tailzie may, immediately upon contravention, pursue declarators thereof, and serve himself heir to him who died last infest in the fee, and did not contravene, without necessity anyways to represent the contravener." It is contended, therefore, that though the tenant in possession immediately succeeds the last holder, he does not necessarily and in every case take as the heir of that person. The heir, having taken by a simple destination, must

collate, and if that Act is not now to be recognised as law, the Appellant must collate such heritage. If he does not do so now, it must be because of the provisions of that Act: the object of that Act was to prevent persons from aliening. The argument of the Appellant proceeds on the practical effect of that Act, and not on its legal operation; and to support his argument, he must treat the heir of entail as a life-renter, and not as the possessor of the fee: yet that Act prohibits him from aliening the fee; it assumes him to be entitled to the fee. If the Act of 1685 does not consider him in possession of the right of the fee, why does it prevent him from doing acts which he cannot do without being possessed of that right? The case of *Farquharson v. Spalding* (b) has been referred to; that case shows that not only must the heir who takes by a simple destination collate, but so must the heir who takes by the bounty of his father, or under his father's marriage settlement. In principle there seems to me to be nothing to impeach the authority of Little Gilmour's case, nor is there any case exactly in point in support of it; but there is a case which, in point of principle, supports it. The case I refer to is that of *Rickart v. Rickart* (c). In that case there were three sisters. The eldest, by a particular disposition or destination of her father, was constituted the heir of entail without division, and she was held not bound to collate the executry with her two sisters. That case proceeded entirely upon the principle that she took the land, not as heir of line, but by special destination, and expressly without division. In the present case this special and exclusive destination did not

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(b) 1 Shaw & D. 435.

(c) Morr. 2378.

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exist. In the case of *Hay Balfour, and others v. Scott*, called the Scotstarvet case (d), the eldest sister was in like manner held not bound to collate. But there again she took the land by special and exclusive destination, and she was in competition as to the personalty not with the heirs portioners only, but with others. In the case of *Rae Crawford v. Stewart* (e), a sister succeeded to the estate as heir by special entail, and she was held not bound to collate because she took not as heir of line, but by special destination. Had she taken in the other character she must have collated. Had the case of Little Gilmour been the reverse of what it was, it might, perhaps, have established a rule more conducive to the equitable arrangement of the rights of different members of a family, and might have avoided some bad consequences flowing from the law as it now exists; as, for instance, if the heir of entail should be a second son he need not collate, though an eldest son must do so; but a decision that would set right that anomaly would be contrary to the law of Scotland. I therefore come to the conclusion that the Little Gilmour case is rightly decided, and if your Lordships are of that opinion you will not hesitate to act upon it, particularly as it lays down a rule which has now for 25 years been constantly and uniformly adopted in Scotland.

Lord *Lyndhurst* :—My Lords, I was present when this case was argued. It was most elaborately argued. I entirely concur with the opinion now expressed by the noble and learned Lord, and I wish further to state, that another noble and learned lord (the Earl

(d) Morr. 2379.

(e) Morr. 2384.

of Devon), who was also present at the argument, fully concurs with the decision now recommended for your Lordships' adoption.

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Decree of the Court below affirmed.

APPEAL

May 18. 21. 23.
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FROM THE COURT OF SESSION IN SCOTLAND.

The Marquis of BREADALBANE and the
Trustees of the late Marquis of } *Appellants.*
BREADALBANE - - - - - }

The Marquis and Marchioness of } *Respondents.*
CHANDOS - - - - - }

An advance of a marriage portion to a daughter does not of itself by the law of Scotland bar her claim to legitim. Such a claim cannot be barred by implication. A marriage contract, in which the father of the lady agreed to pay a certain sum of money "as the portion or fortune of his daughter," and which then went on to describe how the sum should be paid partly in his lifetime and partly out of his estate after his death, was held not to be capable, without more, of barring her claim to legitim.

*Collating of
Real and Per-
sonal Estate.
Heir of Entail.
Legitim.
Marriage Por-
tion.*

An heir of entail, who is not so by exclusive destination, must collate the real estate of which he has as such heir become possessed, before he can claim his share of the legitim of the last holder in tail, to whom he is both heir and next of kin.

THIS was a proceeding in multiplepinding, originally raised at the instance of the trustees of the late

1836. **Marquis of Breadalbane**
BREADALBANE
v.
Marquis and
Marchioness of
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Marquis of Breadalbane against the present Marquis and others, for the purpose of settling the distribution of the personal estate of the deceased Marquis. The Marchioness of Chandos was one of the daughters of the late Lord Breadalbane. The claimants, Lord and Lady Chandos, were married on the 11th of May 1819. The marriage settlements were prepared and executed in the English form of an indenture, to which the Duke (then Marquis) of Buckingham, father of Lord Chandos (then Earl Temple) and the late Marquis (then Earl) of Breadalbane, were also parties. By this indenture Lady Chandos was provided for, out of the family estates of the Duke of Buckingham, by an annuity, which was to vary in certain events from 2,500*l.* to 3,500*l.* respectively. This provision was, by an express clause in the deed, declared to be in full of all Lady Chandos's legal rights, as widow, by the law of England. On the other hand, there was no corresponding discharge of Lady Chandos's legal rights with reference to the law of Scotland but the deed of settlement contained the following clauses: "And whereas a marriage is intended to be had and solemnized between the said Richard Plantagenet Earl Temple and the said Lady Mary Campbell; and whereas upon the treaty for the said intended marriage, the said John Earl of Breadalbane agreed that he would pay or secure the sum of 30,000*l.*, as the portion or fortune of the said Lady Mary Campbell, in the manner hereinafter mentioned (that is to say), the sum of 10,000*l.*, part thereof, to be paid on or before the solemnization of the said intended marriage; the farther sum of 10,000*l.* to be paid at the expiration of 18 calendar months from the day of the solemnization of the said intended marriage, and to carry

interest in the meantime at the rate of 5*l.* per cent. per annum; and the remaining sum of 10,000*l.* to be paid within six calendar months next after the decease of him the said John Earl of Breadalbane, with interest from the day of his decease: and it was agreed that the said Richard Marquis of Buckingham should receive from the said John Earl of Breadalbane the said two sums of 10,000*l.* and 10,000*l.*, first and secondly hereinbefore mentioned, together with the interest of the said sum of 10,000 *l.* secondly hereinbefore mentioned, from the day of the solemnization of the said intended marriage; and in consideration thereof, should enter into such covenant as is herein-after contained, for the payment of the said sum of 20,000*l.* within two years after the solemnization of the said intended marriage, and to pay interest for the same in the meantime; and that the said sum of 20,000*l.*, and the interest thereof, should be further secured in the manner hereinafter expressed; and it was agreed that the said sum of 20,000*l.* so to be covenanted to be paid by the said Richard Marquis of Buckingham, and the said sum of 10,000*l.*, the residue of the said portion of 30,000*l.* to be secured by the bond of the said John Earl of Breadalbane, and to be payable after his decease, and the several securities for the same, should be vested in the said George Neville and John Viscount Glenorchy, their executors, administrators, and assigns, upon, and for such trusts, intents, and purposes, and with and under and subject to such powers, provisions, limitations, declarations, and agreements, as are hereinafter declared, expressed, and contained, of and concerning the same; and in further consideration of the said intended marriage, and also of the said portion or for-

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tune of the said Lady Mary Campbell, the said Richard Marquis of Buckingham, and Richard Plantagenet Earl Temple, proposed and agreed to settle and assure the said several manors or lordships, &c.

“ And whereas in part performance of the said agreement on the part of the said John Earl of Breadalbane, the said Earl hath paid to the said Richard Marquis of Buckingham, upon the day of the date of these presents, the sum of 10,000*l.* of lawful money of Great Britain, and by his bond or obligation in writing, under his hand and seal, in the penal sum of 20,000*l.*, bearing even date with these presents, the same Earl hath secured to the said Richard Marquis of Buckingham, his executors, administrators, and assigns, the payment of the sum of 10,000*l.* of like lawful money of Great Britain, at the expiration of 18 calendar months from the day of the date of the same bond, with interest in the meantime at the rate of 5*l.* per cent. per annum, payable half-yearly, as therein mentioned: And the said John Earl of Breadalbane hath also given and executed another bond or obligation in writing, under his hand and seal, bearing even date with these presents, whereby he has become bound to the said George Neville and John Viscount Glenorchy, their executors, administrators, and assigns, in the penal sum of 20,000*l.*, subject to a condition there underwritten, for making void the same on payment of the sum of 10,000*l.* of like lawful money, to them the said George Neville and Lord Viscount Glenorchy, their executors, administrators, and assigns, within six calendar months after the decease of the said John Earl of Breadalbane, together with interest on the same sum of 10,000*l.* at the rate aforesaid,

from the day of the decease of the said John Earl of Breadalbane.”

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The trust created as above in the persons of the said George Neville and Viscount Glenorchy, is thus set forth: “And this indenture further witnesseth, that for the considerations hereinbefore mentioned, it is hereby declared and agreed by and between the said parties to these presents, that the said George Neville and Viscount Glenorchy, and the survivor of them, and the executors, administrators, and assigns of such survivor, shall stand possessed of and interested in the said sum of 10,000 £., secured by the bond of the said John Earl of Breadalbane, to be paid within six calendar months after his decease, as hereinbefore recited, upon trust, that they the said George Neville and Viscount Glenorchy, and the survivor of them, and the executors, administrators, and assigns of such survivor do, and shall, with all convenient speed, after the said sum of 10,000 £. shall have been received (with the consent in writing of the said Richard Plantagenet Earl Temple, and Lady Mary Campbell, or such one of them as shall be living, or if neither of them shall be living, then at the discretion, and of the proper authority of the trustees or trustee for the time being), lay out and invest the same in their or his names or name, either in the public stocks or funds, or in or upon Government or real securities at interest, and do, and shall from time to time (with the like consent, or of such discretion as aforesaid), call in the principal money so placed out, or make sale of the securities or funds whereupon or wherein the same shall be invested from time to time, and place out the monies thereby arising in or upon such new, or other stocks, funds, or securities, of the same or like nature,

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as they, he, or she, shall think proper, and do, and shall stand possessed of and interested in the said sum of 10,000*l.*, and the stocks, funds, or securities in or upon which the same shall be invested, and the dividends, interest, and annual produce thereof, upon, and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisos, declarations, and agreements hereafter expressed, declared and contained, of and concerning the same."

The late John Marquis of Breadalbane died on 29th March 1834.

He left a widow, the present dowager Marchioness, and issue, an only son, the present Marquis, and two daughters, the present claimant, the Marchioness of Chandos, and Lady Elizabeth Pringle, wife of Sir John Pringle, of Stitchell, Baronet.

He left also a very large succession, both in heritage and moveables. The heritable estate he had held partly under strict entail, and partly in fee-simple. The moveable estate, which is more immediately the subject of the present question, alone amounted to nearly 400,000 *l.*

This succession the Marquis endeavoured to dispose of by various testamentary deeds. But as there had been no antenuptial contract of marriage between him and the Marchioness, those deeds were of course ineffectual to exclude the legal rights either of widow or children.

The Marchioness had accordingly asserted, and been allowed, her legal provisions of terce and *jus relictæ*. Lady Pringle had, by the terms of her marriage settlement, renounced her claim to legitim. Lady Chandos claimed it, and set forth upon the record a plea, that she was entitled, as the only child

of her deceased father, who had not renounced or discharged her right of legitim, to *the whole fund* falling under that denomination.

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On the other hand, it was maintained by the trustees under the late Marquis of Breadalbane's settlements, and by the present Marquis, who, in this particular, adopted the pleadings of the trustees, that Lady Chandos's marriage, and the settlements which then took place, implied or imported a *discharge* of her right of legitim, or formed a personal bar, by *forisfiliation*, to her demand; that, even on the supposition that Lady Chandos should be held entitled to claim legitim, she was bound to impute *pro tanto*, in extinction of that claim, the sum of 30,000*l.*, which was paid to her and her husband by the late Marquis of Breadalbane, or for which the Marquis granted his bond; or that, at all events, Lady Chandos was bound to *collate* the sums which she had either received from the late Marquis of Breadalbane, or for which the Marquis might have granted his bond, before claiming her legitim. Lord Breadalbane contended that he was entitled to *the whole legitim*, as the only child of his father who had not renounced his right; that, even although it should be found that Lady Chandos had not renounced her right, still he was entitled to an *equal* share with her of the legitim, or, in other words, to *one half*.

Lady Chandos replied, that the Marquis of Breadalbane was in no view entitled to participate in the legitim, *without first collating* every benefit he had taken or succeeded to, or might yet take or succeed to, by or through his father, and that whether in his father's lifetime, or in consequence of his death. To which the Marquis rejoined, that he was entitled

1836. *to the legitim, or at least to one half of it specially;*
 Marquis of *without collating his interest in the said entailed estate,*
 BREADALBANE *or in the special bequest, or the provisions or monies*
v. *received from his father during the life of the latter.*
 Marquis and *The case came before Lord Jeffrey as Lordordi-*
 Marchioness of *nary, who, having made his report to the Lords of the*
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ships heard counsel in the case, and then pronounced
a decree, of which the part now material to be con-
sidered was in the following terms:—"Find that the
claimant Mary Marchioness of Chandos, has not,
by her contract of marriage or otherwise, renounced
her legitim, and is therefore entitled to make her
claim for the same accordingly; and, in respect the
said Marchioness of Chandos is the only younger
child of the late Marquis of Breadalbane, who has not
renounced the right of legitim, Find that her claim
extends over one-third part of the free moveable estate
of her said father, and that it is not to be reduced in
amount by imputing thereto any part of the sums
provided to her by her said father, in her contract of
marriage, and which sums, in so far as not yet satis-
fied, must form a deduction from the trust-funds in
medio; reserving to the trustees any claim of relief
for the same that may be found competent to them
against the heirs of entail of the late Marquis of
Breadalbane, and to all other parties their rights,
as accords, and decern accordingly; Find that the
claimant, the present Marquis of Breadalbane, is not
entitled in name of legitim, to any share of the funds in
medio, without collating his interest in the entailed
estates, to which, on the death of his father, he has
succeeded; and, in hoc statu, repel his claim of legitim
accordingly, and decern."

This decree was appealed from by both the present Marquis and the trustees of his late father.

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The *Attorney General* and Mr. *Rutherford* (the *Lord Advocate* was with them) appeared on behalf of the Marquis of Breadalbane.

Mr. *Tinney* and Mr. *Andrews* appeared for the trustees.

Sir *W. Follett* and Mr. *Ivory* (with whom were Dr. *Lushington* and Mr. *Burge*) appeared for the Respondents.

The Lord Chancellor (Lord *Cottenham*):—This is an appeal intended to bring under the consideration of the House two questions ; the first, upon the construction of the marriage settlement of the Lady Mary Campbell, now Marchioness of Chandos, and the other, upon the same rule of Scotch law which your Lordships have already disposed of in the preceding case, namely, whether, before claiming her share of the *legitim*, or child's portion, of the personal property of the late Marquis of Breadalbane, the present Marquis was bound to collate the estates he had taken as heir of entail. Lady Chandos, who was a daughter of the late Lord Breadalbane, married in 1819 Lord Chandos ; and, upon her marriage, a settlement was executed according to the English form, a settlement by which certain annuities or rent-charges, expressly declared to be in satisfaction of her rightful dower, were granted out of the estates of her intended father-in-law the Duke of Buckingham. The settlement also provided that the Marquis of Breadalbane was to pay the sum of 30,000*l.* "as the portion or fortune of the said Lady Mary Campbell,"

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1836. but there was no express renunciation on her part of any future claim on the property of her father. The Marquis of Breadalbane late Marquis of Breadalbane died on the 29th of March 1834, leaving three children, the present Marquis of Breadalbane, Lady Pringle, and Lady Chandos. Lady Pringle released her father's estate from any claim on her part to *legitim* or child's portion, and the questions now raised are contested only by the Marquis of Breadalbane and Lady Chandos. The late Marquis of Breadalbane left a very large succession both in heritable and moveable property; the heritable estate was held partly under strict entail and partly in fee simple. The present Marquis of Breadalbane succeeded to the heritable estates as heir of entail, and now claims his share of the personalty of the late Marquis, to be allowed to him without his being called on to collate the value of the real estate, of which he has already entered into possession. The case came before the Court of Session on these questions, and that Court decided that the Marchioness of Chandos had not renounced her claim to *legitim* by any contract of marriage; and in respect of her being the only daughter who had not renounced, the Court found that her claim was one-third of the free moveable property of her father, and that it was not liable to be reduced by imputing to it any part of the sum mentioned as given to her in the contract of marriage; and further, that the present Marquis of Breadalbane was not entitled to take his share of the moveable estate without collating what he had become possessed of from the heritable estate. Against this judgment two appeals have been lodged, one by the trustees of the late Marquis, and the other by the present Marquis of Breadalbane. The case of *Anstruther v. Anstruther* has already decided the question as to

the present Marquis of Breadalbane's liability to collate the heritable estate before claiming his share of the personalty. The only difference between that case and the present is, that here he does not claim as heir of line but as heir of entail, though not by special and exclusive destination. That, however, does not make any difference as to the liability to collate, arising from an heirship to the party last possessed, and not to the entailer. In my opinion he is clearly bound to collate. The question then which alone remains for our decision is, whether Lady Chandos is barred from making her claim of *legitim*. On this question several points are admitted. One of these is, that the claim of *legitim* is not barred by implication. Again, it is admitted, that it would not be barred in Scotland by a Scotch settlement, except expressly therein declared so to be; but it is contended, that this being an English settlement it would be a bar in this country, and that being so here it must also operate as a bar in Scotland. But in the first place it may be asked, of what would this deed of settlement on the marriage be a renunciation in England? Many cases of double portions have been referred to, but it does not seem to me that they apply to the present. Those were cases of a father making a will and promising to give his daughter a portion, and having afterwards, in his lifetime, given her a child's portion, the provision in the will in her favour has been held to be void. But that is not at all a case like the one which we are now considering. Then cases have been referred to where questions have arisen on the customs of London and York; but it seems to me that they are all in favour of Lady Chandos, for they establish this proposition, that the advances made on marriage may be brought

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1836. in on the claim for the portion of the deceased's estate. That itself shows that the fact of the advance being made is not of itself a bar to such a claim. The cases referred to on these customs are *Blunden v. Barker* (a), which simply shows that a child's orphanage part, according to the custom of London, may be barred by a release or covenant for a valuable consideration. *Cox v. Belitha* (b) carries the matter no further; *Metcalfe v. Ives* (c) merely establishes that the intended husband of a woman, an infant, and whom he afterwards marries, may release her orphanage share of her father's personal estate, and such release will be an extinguishment of the wife's right to the orphanage part. These cases do not show that because he received a marriage portion, the husband would be barred of his claim in his wife's right, but merely that by special agreement he may create a bar to the claim. They do not exclude him from the orphanage part merely on account of the marriage portion, though the custom would, perhaps, make him bring what he had before received into hotchpot. But that is a part of the custom and not of the contract as here. The only expression in this contract of marriage is, that the Marquis of Breadalbane, the father, would pay "30,000 l. as the portion or fortune of his daughter." By the law of Scotland the right to *legitim* cannot be barred but by a special contract. Then, with a view to decide on the contract, in this case the question has been raised, whether this contract is to be construed and enforced according to the law of the country where the contract was made, or that

(a) 1 P. Wms. 634.

(b) 2 P. Wms. 272; 2 Eq. Ca. Abr. 269.

(c) Ca. Temp. Hard. 383. 1 Atk. 63.

where the property on which it is to operate is situated. *Foubert v. Turst* (d); *Talleyrand v. Boulanger* (e); *De La Vega v. Vianna* (f), and *Anstruther v. Adair* (g), have been cited to show how far contracts entered into in other countries are to be enforced according to the law of those countries, or of this country, if put in suit here. But in all those cases there was no ambiguity as to the deeds between the parties, and in none of them was it decided that a contract executed in one country, where it would not have a particular effect, must nevertheless be taken in another country to have such effect there, in the same way as if it had been executed in the latter country, where of itself it would have that effect. Then, it is said that Lady Chandos must elect. What is she to elect? The portion is said to be in lieu of *legitim*. But then that brings in the whole question of the construction of the marriage settlement. As Lady Pringle has renounced, and as the Marquis of Breadalbane has not brought his estate into hotchpot, I do not think that she is bound to elect; but, I am of opinion with the Court below, that she is entitled to her third share of the free moveable estate of her father, and that the present Marquis of Breadalbane must collate the heritage, into the possession of which he has already entered, in order to entitle himself to his share. I therefore move your Lordships that the judgment of the Court below be affirmed.

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Lord *Lyndhurst*.—The main point in this case does not substantially differ from that which we have

(d) 1 Bro. P. C. 129; Prec. in
 Ch. 207.
 (e) 3 Ves. 449.

(f) 1 Barn. & Adol. 284.
 (g) 2 Myl. & Keen, 513.

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decided in *Anstruther v. Anstruther*. As to the second point, after hearing all the arguments, I do not entertain any solid doubt that the judgment of the Court below was right. I therefore entirely concur with the noble and learned Lord who has just spoken, and beg to repeat what I said in the former case as to the concurrence of the other noble and learned Lord (the Earl of Devon) who was also present when this case was argued.

Decree of the Court below affirmed.

WHILE the above appeal was pending, the Appellant found the written proposals which purported to contain the terms of the marriage settlement of the Marquis and Marchioness of Chandos, as approved of by their respective fathers. The proposals concluded with a proviso, that the intended settlement should contain "all other usual and necessary clauses." The Appellant filed a bill in the Court of Chancery in England, against the Marquis and Marchioness of Chandos, alleging, among other things, that the marriage settlement had been prepared on the basis of the proposals, and that, in Scotland, a clause barring *legitim* was a usual clause in the marriage settlement of a child for whom the father advanced a portion. The

bill prayed for a declaration, that the settlement ought to be corrected, and that in the meantime the defendants might be restrained from enforcing payment of the money decreed to them by the Court of Session. The Vice-Chancellor granted the injunction, but the Lord Chancellor, on appeal, dissolved it, and held that as the settlement was in the English form, and applied exclusively to English subject-matter, the proviso was to be construed according to the subject-matter, and therefore a clause barring *legitim*, which was a matter entirely Scotch, could not be considered as comprehended in a phrase used with regard to what would be "usual and necessary clauses" in an English settlement.—*Vide* 2 Myl. & C. 711.

APPEAL

FROM THE COURT OF CHANCERY.

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Feb. 18. 23.
March 24.

GEORGE JOY, HENRY HALL JOY, and }
ELIZABETH JOY - - - - } *Appellants.*

WYRLEY BIRCH, CHARLES WOLLASTON, }
WILLIAM MILES, and DOROTHY ROSE, } *Respondents.*
his WIFE, and THOMAS WILLIAM COKE }

W. C., by indentures, dated in 1800, for the consideration of two sums of 2,000*l.* and 2,000*l.*, granted unto G. J. two annuities of 300*l.* each, charged on his freehold lands at T. H.; and the indentures contained powers of re-purchase by W. C., his heirs and assigns, on giving notice in writing under his or their hands, and paying all arrears.

*Annuity.
Notice of
Re-purchase.*

In 1812, W. C. agreed to sell all his lands (including those at T. H.), to W. B. for 90,528*l.*, and to convey free from incumbrances, except certain mortgages, and in pursuance of the agreement W. B. was let into possession, and paid large sums. The annuities to G. J. being in arrear, in 1818 W. C. granted to him all his lands on trust to sell them, and out of the proceeds, to retain costs and pay incumbrances; and, in 1824, W. C. assigned to G. J. the unpaid balance of the said purchase-money, subject to prior charges, to apply the same in payment of what was stated in account to be due to G. J. Nothing was done on these deeds.

W. B. filed a bill in 1825 for specific performance of the agreement with W. B., and for re-purchase of G. J.'s annuities, alleging that W. C., at W. B.'s request, gave G. J. such notice as was required to enable W. C., or W. B. in his place, to re-purchase the annuities, and that on the day in the notice mentioned, the agents of W. C. and W. B. went to G. J.'s residence, to pay the principal and arrears with costs, and to tender deeds of transfer for his execution, and G. J. being from home, they left a notice that the money and

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deeds would remain for 10 days at the office of one of them. The Bill prayed for a declaration that the annuities had ceased from that day.

G. J., by his answer, admitted the service of a notice, signed W. C., by E. C. and P. A. H., his attornies, but insisted that they had no authority from W. C., and that the notice was irregular and of no avail, as not being in pursuance of the powers of re-purchase.

HELD by the Lords (reversing the decree of the Vice-Chancellor and Lord Chancellor), that the annuities had not ceased, that the notice of re-purchase was not in strict pursuance of the power in the deeds, and was also defective in not naming a place for payment of the money.

WILLIAM COLHOUN, being seised in fee simple, or otherwise well entitled to him and his heirs, of or to the Manor of Thorpe Hall, otherwise West Wretham, and several other messuages, farms, lands, tenements, and hereditaments, situate in the county of Norfolk, subject to some mortgages and other incumbrances, by indentures of lease and release, bearing date respectively the 5th and 6th of March 1800, and made by and between himself, of the first part, the Appellant, George Joy, of the second part, and Michael Joy, as trustee therein described, of the third part, in consideration of the sum of 2,000 *l.* granted unto the said George Joy, his executors, administrators and assigns, an annuity of 300 *l.* during the lives of two persons therein named, and the life of the survivor of them, and the same was charged on the said manor of Thorpe Hall, which was stated to be then subject only to a mortgage for 12,000 *l.*, to Josiah Holford. By the indenture of release, in addition to the usual powers of distress and entry, the premises were limited to the use of Michael Joy for a term of 99 years,

upon trust for further securing payment of the annuity, and it was thereby witnessed, that G. Joy did thereby, for himself, his executors, administrators, and assigns, covenant, promise, and agree to and with W. Colhoun, his executors, administrators and assigns, that "in case W. Colhoun, his heirs, executors, administrators, and assigns should, at any time after the 6th of March 1804, be desirous to re-purchase the said annuity or yearly rent-charge of 300 l., and of such his or their intention should give unto G. Joy, his executors, administrators, or assigns, 12 calendar months' notice in writing, under his or their hand or hands, that then and in such case he, G. Joy, his executors, administrators, or assigns, should and would, at the end of the said 12 calendar months, for which such notice should be given, on receiving from W. Colhoun, his heirs, executors, administrators, or assigns, all sum and sums of money which should be then due for arrears of the said annuity or yearly rent-charge, up to the day of re-purchasing the same, accept and take the sum of 2,000 l. in full, for the re-purchase of the said annuity or yearly rent-charge, and on receipt of the said sum of 2,000 l., and all arrears of the said annuity or yearly rent-charge, should and would, at the proper costs and charges of W. Colhoun, his heirs, executors, administrators, or assigns, release, surrender, and assign, or cause to be released, surrendered, and assigned, the securities for the same, unto the said W. Colhoun, his heirs, executors, administrators, or assigns, or unto such person or persons as he or they should nominate or appoint."

By other indentures of lease and release, dated respectively the 8th and 9th of May 1800, and made by and between the same parties to the above recited indentures, W. Colhoun, in consideration of another

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sum of 2,000 *l.*, granted another annuity of 300 *l.* unto G. Joy, his executors, administrators, and assigns, during the lives of two other persons therein named, and the life of the survivor of them, charged in like manner on the said manor of Thorpe Hall. This indenture of release contained similar powers of distress and entry, similar trusts of a term thereby limited to Michael Joy, and a similar power of re-purchase of this second annuity, as were contained in the first indenture.

On the 22d of February 1812, Colhoun entered into an agreement in writing with the Respondent, Wyrley Birch, for the absolute sale and conveyance to Birch of the said manor of Thorpe Hall, and all the other messuages, farms, lands, tenements and hereditaments of Colhoun, therein particularly described, free from incumbrances, except the said mortgage of 12,000 *l.*, and another mortgage for 5,000 *l.*, for the price of 95,000 *l.*, payable by instalments, to be secured by a mortgage of the estates. This sum was afterwards reduced to 90,528 *l.* 10*s.* 8*d.*, in respect of a deficiency in the value of the timber on the estate from Colhoun's estimate.

The agreement made no mention of Joy's annuities charged on Thorpe Hall, nor of other incumbrances affecting other parts of the estates. On the discovery of those charges and incumbrances, and in pursuance of a supplemental agreement entered into on the 24th of October 1812, by the respective agents of Colhoun and Birch, for the purpose of facilitating the completion of the purchase, Birch was, in consideration of his advancing certain sums of money to pay off some of the incumbrances, let into possession of all the estates comprised in the former agreement, or into the receipt of the rents and profits, and he continued

in such possession or receipt, and paid G. Joy several sums of money in respect of his annuities. The second agreement provided, that in case Birch should be called upon to pay Holford's mortgage interest or Joy's annuity, or other charges affecting the estates, and fines for renewal of certain leases, he might hold the renewed leases as security for his advances. That was the only mention that was made in the agreements of Joy's annuities.

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By indentures of lease and release, dated respectively the 12th and 13th of October 1818, Mr. Colhoun granted unto G. Joy and his heirs all his real estates in Great Britain and Ireland, over which he had any power of disposition, subject to the charges and incumbrances affecting the same, upon trust to sell and dispose of them, as therein mentioned, and with all necessary powers for that purpose; and to stand possessed of the monies arising from such sales, first, to pay the expenses of executing the said trusts, and, next, to pay off all the charges and incumbrances affecting the premises, and to pay the surplus to Colhoun, his executors, or administrators, or as he or they should appoint.

The two annuities fell considerably in arrear, and Birch being desirous to discharge the estates from the claims of G. Joy, requested (as he alleged in his bill hereinafter stated) Colhoun, who, in consequence of his embarrassments, was then residing in Jersey, to give Joy such notice as was required by the annuity deeds for the re-purchase of the annuities; and a notice was given in April 1823. Before the expiration of 12 months from the date of the notice, Joy had a meeting with Colhoun in Jersey, and after submitting to him a statement of the arrears due in respect of the annuities and other claims (as he stated

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in his answer hereinafter mentioned), Colhoun, by an indenture bearing date the 6th of April 1824, assigned to him the balance of the purchase-money of 90,528*l.*, then unpaid, subject to prior incumbrances, upon trust for securing payment of what was due to G. Joy. Notice of this indenture was given to W. Birch. No proceeding was taken either on this or on the indenture of 1818 above-mentioned. Some negotiation took place between Birch and Joy, and their respective solicitors, respecting the settlement of Joy's claims and discharging his annuities, without coming to any result.

Michael Joy, the trustee in the annuity deeds, died in July 1825, having by his will appointed the Appellants, Henry Hall Joy and Elizabeth Joy, his executors.

In Michaelmas Term, 1825, Birch filed his bill in Chancery against the Appellants and Mr. Colhoun, and also against other persons who claimed to be entitled to certain charges on the said estates. The bill stated, among other things, the agreements of February and October 1812 between Colhoun and the Respondent Birch, and that, in pursuance thereof, the latter was let into possession of the purchased estates, and had paid out of the purchase-money various charges affecting them; and it stated the grants of annuities of 300 *l.* and 300 *l.* to the Appellant G. Joy, and that the said Respondent had paid the said Appellant various sums in respect of the same, and that being desirous to pay him what might be justly due to him, and to exonerate the estate and premises from his claims thereon, he requested Colhoun, in performance of his agreements, to give G. Joy such notice as was required by the annuity deeds, to enable him, Colhoun, or the Respondent in his place, to re-purchase the same; and such notice,

in writing, was duly delivered to the Appellant, G. Joy, in behalf of Colhoun, on the 14th of April 1824; and that, pursuant to that notice, and on the 5th of May 1824, the day therein for that purpose mentioned, Mr. Tooke, Birch's solicitor, on his behalf, and Mr. Syms, on behalf of Colhoun, went to the Appellant, G. Joy's residence, for the purpose of tendering the sum of 4,000 *l.*, together with all arrears of the said annuities, and the costs and expenses incurred by the Appellant in recovering the payment of the consideration money for the same, and also for the purpose of tendering the deeds of transfer of the annuities for execution by the Appellant, but that Tooke and Syms were then informed that the Appellant was from home, and gone to Guernsey or Jersey, and thereupon they left at his house a written notice, as follows:—"Sir, You are desired to take notice, that we have this day attended at your residence, No. 24, New Ormond-street, Bedford-row, for the purpose of tendering to you the payment in money of the principal and arrears due to you upon the two several annuities of 300 *l.* each, charged upon a certain manor, messuage, farms, lands and hereditaments, called Thorpe Hall, in the parishes of East and West Wretham, or one of them, in the county of Norfolk, late the estate of William Colhoun, Esq., and contracted by him to be sold to Wirley Birch, Esq., together with the payment of all reasonable charges and expenses incurred by you in recovering the payment of the same; and together also with the deeds of transfer of the said annuities, and other securities, the draft of which deeds of transfer have been submitted to Messrs. Amory & Coles, your solicitors, for perusal on your behalf. And we do hereby give you further notice, that the money for the discharge of

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the said principal and arrears, together with your reasonable costs and charges as aforesaid, and with the other deeds of transfer, will remain at the office or chambers of Messrs. Tooke & Carr, situate in Holborn Court, Gray's Inn, for the space of ten days from the date hereof, for the purpose of being paid over to you, when you shall apply for the same money, and shall execute the said deeds of transfer, pursuant to the covenant contained in the grants of the said annuities respectively. Dated this 5th day of May 1824. (Signed) Tooke & Carr, for the said Wyrley Birch, and Frederick George Syms, for the said William Colhoun."

The bill further stated, that no conveyance of the said annuities had been executed by the Appellants, or by Michael Joy in his lifetime, to Colhoun or the Respondent Birch, nor had any conveyance of the said estates and premises, or any part of them, been executed by Colhoun to the said Respondent; and that the Respondent had offered to perform his part of the said agreement with Colhoun, and to pay the remainder of the purchase-money, after payment of the incumbrances affecting the estates, as Colhoun should direct; and that he also offered to pay the Appellant, G. Joy, what was justly due to him in respect of the annuities. The bill charged, that the Appellants pretended that, according to the terms of the conditions of re-purchase in the indentures of March and May 1800, the Appellant, G. Joy, was entitled to receive not only the several sums of 2,000 *l.* and 2,000 *l.*, and the arrears due upon the annuities respectively to the 5th of May 1824, and his reasonable costs, and which the Respondent Birch offered to pay, but that he, G. Joy, was also entitled to receive and be paid interest at the rate of five per cent. upon the

arrears of the annuities, from the time when such arrears respectively became due; and also the sum of 1,000 *l.* for expenses incurred, as he alleged, on account of such arrears, whereas the Respondent charged the contrary thereof; but, nevertheless, that the Appellant, G. Joy, absolutely refused to permit the said annuities to be re-purchased, unless the Respondent Birch consented to pay such interest and expenses. And the bill also charged, that Colhoun, colluding with the Appellant, G. Joy, refused to complete his agreement with the Respondent, until such unjust demands of G. Joy were complied with, and had actually given the Respondent notice to pay the same to G. Joy, in preference to previously existing incumbrances on the said estates, and had also conveyed to G. Joy all his interest in the residue of the said purchase-money. And the bill further charged, that, under the circumstances, the annuities had ceased, &c.

The bill prayed, among other things, that Colhoun might be compelled, by decree of the Court, specifically to perform the said agreements on his part, and to execute to the Respondent a sufficient conveyance of the said estates and premises, the Respondent being willing to perform the said agreements on his part, and to pay to Colhoun, or according to his direction, the residue of the purchase-money, after paying thereout such incumbrances affecting the estates and premises as, under the terms of the said agreements, the Respondent was authorized to pay, and for enabling the Respondent thereto, that the priorities of the said incumbrances might be ascertained by the decree of the Court; and that it might be declared, that the two annuities of 300 *l.* and 300 *l.* charged on the said estates, ceased and determined on the 5th day of

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May 1824; and that an account might be taken, under the direction of the Court, of the arrears of the said annuities respectively, which accrued due on and prior to the 5th day of May 1824, and of the costs and expenses reasonably incurred by the Appellant, G. Joy, in respect of such arrears, and that on payment of what should be found so due, together with what should be due on the two several sums of 2,000*l.* and 2,000*l.*, and which the Respondent Birch thereby offered to pay, the Appellants might be decreed to execute all deeds, and do all such acts as might be necessary to reconvey the said annuities, and all securities for the same, to the Respondent Birch.

The Appellant, G. Joy, put in his answer in May 1826, and thereby, after admitting his belief that the Respondent Birch had entered into such agreement with Colhoun for the purchase of the said estates as in the bill mentioned, stated, among other things, that he had been informed by Colhoun, and he believed, that the Respondent Birch did not request Colhoun to give the Appellant such notice of re-purchase as in the bill mentioned. The Appellant admitted that such notice, signed "William Colhoun, by his attornies, Edward Coke and P. A. Hanrott," was served on him, but he had always protested against the authority of the said Coke and Hanrott to interfere in the concerns of Colhoun; he, the Appellant, having previously thereto received from Colhoun an irrevocable power of attorney at the instance of the said Coke, and on the refusal of the said Hanrott to act in the management and settlement of the affairs of Colhoun; and the Appellant believed that the signature of Coke to that notice was incautiously given or surreptitiously obtained, and Colhoun informed him that he had no knowledge of such notice,

and that he gave no instructions to Coke or Hanrott to give such notice. And the Appellant submitted that the said notice so given, was altogether irregular and of no avail, inasmuch as the same was not in compliance with the terms of the said annuity deeds, which required that the notice to be given for the repurchase of the annuities should be in writing under the hand of Colhoun. And the Appellant stated, that after the said notice had been so given, and before the time mentioned therein had expired, Colhoun had settled his accounts with the Appellant, admitting that such notice was not available, and that Colhoun executed to the Appellant an assignment of all his right and interest in the said purchase-money, for securing to him, the Appellant, the payment of the amount due to him on the settlement of such accounts, which assignment was duly notified to the Respondent Birch, and that, in consequence thereof, no tender was made to the Appellant. And the Appellant stated that he had been informed, and believed, that pursuant to such notice, Mr. Tooke, on behalf of Birch, and Mr. Syms, pretending to act on the behalf of Colhoun, but without his knowledge or any authority from him, did go to the Appellant's residence in New Ormond-street, for the purposes in the bill mentioned, and that they were then informed, as the fact was, that the Appellant was then from home; and he believed that at the time in the bill mentioned, Tooke and Syms did leave at the house of the Appellant such written notice as in the bill mentioned; and the Appellant by his said answer stated, that no conveyance of the said annuities had ever been executed by the Appellant and the said Michael Joy, or either of them, to Colhoun or Birch; and he submitted, that the Respondent Birch was not, by virtue of the

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said agreement entered into by him with Colhoun, entitled to all the rights and privileges of Colhoun, in respect to the power to re-purchase the said annuities from the Appellant, no conveyance of the said estates having been made to the Respondent Birch, by Colhoun, and the said Colhoun having, by a subsequent deed, recognized the annuities, and directed them to be kept on foot. And the Appellant G. Joy, by his said answer, stated that he did not claim to be entitled to anything which was not justly due to him, and that the amount of his claim down to the 6th of April 1824, was ascertained and admitted by Colhoun, and the account settled, and the deed of assignment executed by him, and which the Appellant by his said answer claimed to be allowed accordingly, together with what had subsequently accrued due. And he submitted and insisted that the said annuities could not be discharged during the continuance of the only life for which each annuity was then held; and that the sum of 1,000 *l.* in the bill mentioned, was not, as therein set forth, so much over and above his reasonable costs, but was in fact the reasonable and admitted amount of the Appellant's costs and expenses, time and trouble, incurred in seeking to recover what was justly due to him in respect thereof, down to the date of the 25th October 1817, and which amount, the Appellant stated, having been allowed by Colhoun, the Respondent Birch undertook or agreed to pay, but which he afterwards refused to do; and the Appellant submitted that, under such circumstances, he did require payment thereof; and he further stated, that the amount of his claim up to the 25th of October 1817 appeared in the accounts which had been rendered by him to Colhoun, and for the payment of which Colhoun gave an order on the

Respondent Birch at that time, and which demand of the Appellant on Colhoun, together with the sum since accruing due, had been since recognized and confirmed by him, and in particular by the deed of assignment of the month of April 1824.

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Mr. Colhoun and the other Defendants put in their answers, except Priscilla Wollaston, who died.

The Respondent replied to the answers, and the cause was at issue, when, on the 19th of April 1829, and before any further proceedings were had in the cause, Mr. Colhoun died intestate, leaving Grace, the wife of Edward Coke above mentioned, his only child, and heiress at law. Mr. Birch filed his bill of revivor and supplement against her and her husband, and also against F. G. Syms, the personal representative of Colhoun; and the suit was revived accordingly in November 1829.

The evidence on behalf of the Appellant G. Joy, consisted of exhibits of the several indentures before mentioned, viz. the indentures of the 5th and 6th of March, and of the 8th and 9th of May, 1800, by which the annuities of 300 *l.* and 300 *l.* granted to him were charged on the Thorpe Hall estate; the indentures of the 12th and 13th of October 1818, being a conveyance to him of all Colhoun's estates, in trust for sale; and the indenture of assignment to him, by Colhoun, of the purchase-money of the said estates, dated the 6th of April 1824, together with proofs of the settlement of certain accounts therein stated. Several letters also from Colhoun to the Appellant were put in evidence. In one of them, dated "Guernsey, October 24, 1817." Colhoun writes, "Sir, I am indebted to you for the information, that there is now only one life existing on each of the annuities granted to you in 1800, on my estate at Wre-

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tham. This being the case, it is my desire that they should remain until the expiration of the respective lives, and that Mr. Birch should place in security to your satisfaction, a sufficient sum, to secure the payment of the instalments as they become due, &c." In another letter, dated from the same place, October 25th of the same year, Colhoun writes, "Sir,—I repeat, as I have always told you, that I have no desire to diminish the amount justly due to you, as well for the interest on the arrears of your annuities as for the expenses incurred, and the time and labour expended in seeking your dues. I recognize my repeated assurances, that any delay in the payment of the instalments as they become due, should be compensated by the payment of interest thereon, &c. I send you herein an order on Mr. Birch to pay you, not only the arrears that are still due to you, but the interest, for which you shall state an account to him from the beginning of our transactions, crediting, as in the former accounts passed between us, the interest on the sums received for me from others." This order on Mr. Birch further directed him to pay the Appellant 1,000 *l.* for his law charges, and travelling and other expenses, incurred by the Appellant in seeking his dues, from the first defalcation in the payment of the annuities. In two other letters, both dated from Jersey, the 3d of April 1824, Colhoun writes to the Appellant thus: in one, "I have examined your accounts, and find only a small error in transferring the balance of interest from the year 1801 to the year 1802 to your prejudice, 10 *s.*, and interest from October 1817 to February 1824, 3 *s.* 3 *d.*, which is corrected in the reverse account, &c." In the second letter, Colhoun writes: "Dear Sir,—On recollection, though not apprised of the notice to which you refer, I think I

was advised of some intention to give it, but on the other hand, I understood that you were content it should be so; otherwise, having taken the chance of the lives dropping so long, and they being so much older, it is my desire they should continue during the respective lives remaining on each, and that the deposit may remain for the security of the regular payment of them, in conformity of my former order, &c.

On behalf of the Respondent W. Birch, the following documents were proved at the hearing, *vivá voce*, viz.: The two agreements of the 22d of February and 24th of October 1812, the power of attorney dated 23d of April 1821, from Colhoun to Coke and Hanrott, and the deed poll of the same date, revoking the power of attorney given to the Appellant on the 13th of October 1818, all of which are hereinbefore stated in the pleadings.

The *Vice-Chancellor*, before whom the cause came to be heard in February 1828, made a decree of that date, whereby, after declaring that the agreements between Mr. Colhoun and Mr. Birch on the 22d of February and 24th of October 1812 should be specifically performed, his Honor further decreed, "that the said annuities of 300*l.* and 300*l.* ceased and determined on the 5th of May 1824, when the notices to re-purchase them, which were admitted by the Appellant's answer to the bill to have been given by Mr. Colhoun to the Appellant, expired. And it was by the said decree ordered, that it should be referred to the Master to take an account of what remained due to the Appellant for the arrears of the annuities up to the 5th of May 1824; and it was declared that the Respondent Birch was entitled to a reconveyance of the terms created for the security thereof, upon payment to the

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Appellant of 2,000 *l.* and 2,000 *l.* for the purchase-money of the said annuities, and of what should be found due for the arrears thereof." The decree directed several other inquiries to be made by the Master, but which it is not necessary here to set forth. The whole decree was affirmed on appeal to the Lord Chancellor, by an order bearing date the 10th of August 1831.

Against so much of the decree as is above set forth, and against the Lord Chancellor's order affirming it, the Appellants presented their petition of appeal to this House in February 1833; but before it was ready for hearing, George Wollaston and John Rose Drew, incumbrancers on the estates in question, and defendants to the original bill, and also the aforesaid Grace Coke and G. F. Syms, defendants to the bill of revivor and supplement, departed this life. In January 1835 Mr. Birch exhibited his bill of revivor against their respective representatives, and the suit was accordingly revived against Charles Wollaston, as the legal personal representative of George Wollaston; against William Miles and Dorothy Rose, his wife, as the legal personal representatives of John Rose Drew; against Thomas William Coke, as the heir-at-law of Grace Coke and of William Colhoun; and against the Appellant, G. Joy, as the legal personal representative of Mr. Colhoun, by virtue of administration granted to him to Colhoun's goods and chattels left unadministered, by G. F. Syms. By an order of this House, made on the petition of the Appellants in July 1835, the said Charles Wollaston, William Miles, and Rose, his wife, and Thomas William Coke, were made parties Respondents to the appeal, and the appeal so revived now came on for hearing.

Mr. *Knight* and Mr. *Sharpe* for the Appellants:—The decree is erroneous, first, and principally, in declaring that the annuities had ceased and determined from the 5th of May 1824; secondly, in not allowing the Appellant, George Joy, interest on the two sums of 2,000*l.* and 2,000*l.*, the purchase-monies of the annuities, from the day on which it declared that they had ceased; thirdly, in not declaring him entitled to his reasonable costs and expenses in recovering payment of the arrears up to that day; and lastly, in not referring it to the Master to inquire what were the incumbrances affecting the purchase-money due from the Respondent Birch, and what was due for principal and interest upon them.

The notice alleged by the Respondent's bill to have been given to Mr. Joy, to enable Mr. Colhoun or the Respondent to redeem the annuities, was not pursuant to the terms of the powers of re-purchase contained in the annuity deeds. The conditions of re-purchase were, that in case Colhoun, his heirs, executors, administrators or assigns, should, at any time after 1804, be desirous to re-purchase the annuities, and should of such his or their intention give to Joy, his executors, administrators or assigns, 12 months' notice in writing, under his or their hand or hands, then, and in such case, Joy, his executors, &c., should, at the end of 12 months, on receiving from Colhoun, his heirs, &c., all sums of money whatsoever then due for arrears of the annuities, up to the day of re-purchasing the same, accept the sums of 2,000 *l.* and 2,000 *l.* in full for the re-purchase. The notice given in the name of Colhoun by Coke and Syms, was not authorized by Colhoun, and was not, therefore, binding on Mr. Joy. In order to have the benefit of a proviso for re-purchase, the terms of it must be strictly com-

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plied with, *Barrell v. Sabine* (a). The power of attorney granted by Colhoun to them was insufficient for the purpose of the notice. The power was dated in April 1821, two years before the date of the notice, to which it contained no reference, express or implied. It recited that Colhoun being, in consequence of his residence abroad, incapacitated from managing his estates in England, appointed Coke and Hanrott his attornies, with powers expressed in general words. It is a well-established rule that general words in an instrument are restricted by the recitals to the subject matter, and must be construed by the tenor of the instrument: *Thorpe v. Thorpe* (b), *Simons v. Johnson* (c). There was no place named in the notice for payment of the money.

But even if the notices, which the bill alleged to have been given to Mr. Joy, should be held to be in compliance with the terms of the provisoes contained in the annuity-deeds for the re-purchase of the annuities, it was not proved in the cause, nor admitted by the Appellant, G. Joy, in his answer, that such notices had in fact been given to him, nor that any tender had been made of the sum of 4,000*l.*, the re-purchase money of the annuities, together with all the arrears, and the costs and expenses incurred by Mr. Joy in recovering the payment of the annuities, on the 5th day of May 1824, the time mentioned in the notice; nor that Mr. Colhoun, or any agent on his behalf, was in fact prepared to make such tender at that time. There is no doubt that a sufficient tender stops interest and costs. The notice, if admitted to be sufficient, should be followed up by payment or tender of the

(a) 1 Vern. 268.

(b) 1 Ld. Raym. 235, and 662.

(c) 3 Barn. & Adol. 175.

money, with interest to the time, and costs, which even the second notice left by Tooke and Syms at the Appellant's house, and also the Respondent's bill, offered. To constitute a good tender there must be an actual offer of the money produced, or the production of it must be dispensed with by an express declaration or equivalent act of the creditor, *Thomas v. Evans* (c), *Leatherdale v. Sweepstone* (d). These are cases of legal tender, but there must be good tender in equity, as at law, to stop interest: *Gyles v. Hall* (e), *Bishop v. Church* (f), *Meade v. Earl of Bandon* (g). A purchaser, in order to escape the payment of interest on the purchase-money, must show that it was lying idle for the special purpose of completing the contract of purchase, and that the vendor had notice it was ready and unproductive: *Howland v. Morris* (h), *Calcraft v. Roebuck* (i), *Roberts v. Massey* (j), *Powell v. Martyr* (k), *Gilbert v. Blades* (l). The cases on that head are collected in Sir Edward Sugden's book on vendors and purchasers, p. 502. There is no attempt in this case to show that the money for re-purchase of the annuities was lying idle and unproductive to Mr. Birch.

Again, even if the said notices had been regularly given to the Appellant for re-purchasing the annuities on the 5th of May 1824, who can doubt that they were waived and abandoned, and rendered of no effect by the settlement of accounts which took place between Colhoun and the Appellant in the month of April 1824, and by the letters written by Colhoun on

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(c) 10 East, 101.

(d) 3 Car. & P. 342.

(e) 2 P. Wms. 378.

(f) 2 Ves. sen. 372.

(g) 2 Dow. 268.

(h) 1 Cox, 59.

(i) 1 Ves. jun. 223.

(j) 13 Ves. 561.

(k) 8 Ves. 146.

(l) 2 Sim. & S. 393.

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the 3d of April, and by the indenture of assignment of the 6th day of April of that year, executed by Colhoun ; in which accounts, letters and assignment, Colhoun treated the notices as void, and the annuities as subsisting and continuing annuities? The alleged admission of the notices by the Appellant in his answer, was followed by an emphatic denial of any authority from Colhoun to give the notices. The notices professed to be the notices of Colhoun, but in fact they were the Respondent's notices. While he sought to have the benefit of them, he evaded the liability to which he would have subjected himself, to pay the money, if they were given by himself.

But if the decree had been right in declaring that the annuities ceased on the 5th of May 1824, still it was erroneous in not giving the Appellant interest on the two sums of 2,000 *l.* and 2,000 *l.*, the purchase-money of the annuities, from the day on which they ceased to the time of payment, Mr. Birch having been ever since the 5th of May in possession or in the receipt of the rents and profits of the estates upon which the annuities are charged, and having also been entitled, under the agreements between him and Colhoun, to retain in his hands a sufficient part of the purchase-money to satisfy the incumbrances thereon, including the annuities. And according to the terms of the deeds granting the annuities, the Appellant is entitled not only to the consideration money, and to all arrears of the annuities, but also to all the reasonable charges and expenses incurred by him in recovering payment up to the 5th of May 1824.

The last objection to the decree is most material to be considered. The Appellant having, by the evidence adduced by him in the cause, proved the due

execution, by Colhoun, of the indenture of assignment of the 6th of April 1824, whereby Colhoun charged the balance of the purchase-money, due to him from the Respondent, with the payment to the Appellant, of the sums mentioned in that indenture, the Appellant was entitled, on the hearing of the said cause, to have it referred to the Master to inquire and state to the Court, what were the incumbrances affecting the said balance of the purchase-money, and what was then due for principal and interest upon such incumbrances.

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Mr. *Wigram* and Mr. *Flather*, for the Respondent Birch:—The question in the appeal is, between Mr. Birch and Mr. Joy, as to what extent the estates stand charged. In equity a purchaser is entitled to all the privileges and advantages of the legal owner of the estate, from the time when, by the terms of the agreement, he is entitled to the beneficial interest; and therefore, in the month of April 1823, and long previously, Mr. Birch was entitled to the benefit of the covenant contained in the annuity-deeds, for repurchasing the annuities. The notice by Colhoun, delivered by his lawful attornies on the 16th April 1823, for the re-purchase of the annuities, was in strict compliance with the terms of the condition of re-purchase, and it was not competent for the Appellant, after the receipt of such notice, to evade the tender of the purchase-money, by absenting himself from his dwelling-house at the time when, by the notice, he well knew the tender was to be made. That notice having been given by Colhoun, the benefit of it belonged of right to Mr. Birch, as the purchaser of all Mr. Colhoun's interest in the estate; and therefore Mr. Colhoun had no power to recal such notice, and by that means to continue the annuities a charge upon

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the estate previously sold by him, or to do any act to the prejudice of the interest of Mr. Birch in the estate purchased.

The claim of interest on the purchase-money was not well founded. The cases of vendors and vendees, or of mortgagors and mortgagees, are not applicable, because in these cases, at least in the cases of mortgages, there is generally a provision for the interest. But in cases of debt, interest is only due in cases of contract or mercantile usage, which is contract, or unjust detention; and none of these circumstances occurred in this case. The conduct of the Appellant was the sole occasion of the delay in the completion of the re-purchase. The annuitant could not by his delay continue his right to the annuity contrary to the provision of the deed by which it was granted. The purchase-money was not only ready at the time when the Appellant ought to have accepted it, but Mr. Birch has since been exposed to the loss and inconvenience arising from his liability to be called upon at any hour for so large a sum as 4,000*l.*, which, therefore, he has been compelled to keep ready for that purpose idle and unproductive ever since. There is no contract for interest, and as the annuities were never conveyed to Mr. Birch, he had not the power to enforce payment of them, and the estate itself has not produced more than sufficient to satisfy prior charges, and more than the whole of the purchase-money has been applied in paying off the incumbrances on the estate. The notice of re-purchase and the undenied fact of Tooke and Syms having gone to pay the money on the proper day, and to tender for execution the deeds of transfer, are a sufficient answer to the claim of interest, *Gyles v. Hall* (*m*), *Manning v.*

(*m*) 2 P. Wms. 378.

Burgess (n), *Levy v. Lord Herbert* (o), *Wilmot v. Wilkinson* (p).

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The answer of Mr. Colhoun, imputing no less than fraud to the Appellant, if it could be read as evidence against the Appellant, would dispose of all the questions in the cause. But it formed part of the discussion in the Court below, and helped to adjust the rights of the parties. Without referring to that answer, the indenture of the 6th of April 1824, put in evidence by the Appellant, bears internal evidence of being the act of a mind at that time incapable of business, or of the exercise of undue influence on the part of the Appellant. Colhoun was, at the time of the execution of the deed, of the age of 75 years, and was separated from his friends and professional advisers. The object of the Appellant in obtaining that deed was to increase his charge upon the estate at the expense of the Respondent, although nothing was justly due to him beyond his original claim.

It was immaterial to Mr. Birch whether Colhoun or Joy was to have the purchase-money. They might settle their cross claims among themselves, and it was with that view that the Court below directed an inquiry into the incumbrances on the estates.

Lord *Plunkett*:—The difficulty in supporting Mr. Birch's case, is, that he insists that his agreement with Colhoun obliges Colhoun to redeem the annuities, whereas nothing was said about them at the time of the agreement.

Mr. *Wigram*:—There was no mention of the annuities in the first agreement; they were incidentally mentioned in the second. Mr. Birch, as purchaser,

(n) 1 Chan. Cas. 29.

(o) 7 Taunt. 314.

(p) 6 B. & C. 506.

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claims to be entitled to all the rights of the owner, and he relies on the clause of re-purchase by Colhoun, whose attornies gave due notice in his name, and his agent afterwards went to tender the money.

Lord *Lyndhurst* :—Suppose Mr. Joy had been at home when Tooke and Syms went to offer the money, and said to them, you have no right to make this tender; I will not receive the money; I will hold my incumbrance on the estate?

Mr. *Wigram* :—In that state of facts the tender would be sufficient to stop interest. The Appellant insists that the correspondence of 1817, followed by the deed of October 1818, destroyed the power of re-purchase reserved to Mr. Colhoun.

Lord *Plunkett* :—Supposing Mr. Birch had a right to be indemnified against the annuities, was it competent to him to require Mr. Colhoun to pay 4000 *l.* for the redemption of them, after one life in each annuity had dropped?

Mr. *Wigram* :—A contract cannot be affected by alteration in the value. Mr. Colhoun having contracted to convey free from incumbrances, could not compel Mr. Birch to take, subject to this charge, which was not among the exceptions in the contract.

Lord *Plunkett* :—Colhoun might say, I will secure you against the annuities, but I will not re-purchase them; for they are not now worth the money I received for them.

Mr. *Wigram* :—Colhoun could not be heard to say anything of the sort, in the face of his agreement to convey free from incumbrances.

Mr. *Knight*, in reply:—Colhoun was not obliged to redeem the annuities (he referred to the terms of the power of re-purchase) (q), and, under the circumstances, he could have compelled Birch to accept an indemnity against the annuities. Colhoun's letters to Mr. Joy in 1817, proved in the cause, showed that Colhoun had no wish to re-purchase. The argument for the Respondent was, that the general words in the power of attorney to Coke and Syms gave them the power of contravening the arrangements between Colhoun and Mr. Joy in 1817 and 1818, by which Colhoun deprived himself of the power of giving notice for the re-purchase. Even if the notice was a valid notice at the time it was given, Colhoun, after the date of that notice, and before the time arrived for payment of the money, pursuant to the notice, did an act—the execution of the deed of April 1824—which superseded the notice.

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The Earl of *Devon*:—My Lords, This is an appeal from the Court of Chancery, in which Mr. Joy complains of a judgment given by the Vice-Chancellor, and affirmed by the late Lord Chancellor (Lord Brougham.) The case was argued here during two days, before my noble and learned friend (the Lord Chancellor), who had the assistance of the Lord Chancellor of Ireland and of Lord Lyndhurst. I am in hopes your Lordships will have the advantage of hearing what their opinions are, but circumstances making it inconvenient to me to attend here again on an early day, my noble and learned friend on the woolsack has given me permission to state now what has occurred to me upon a careful consideration of the case and of the arguments.

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(q) Ante, p. 59.

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The bill was filed by Mr. Birch against Mr. Colhoun, Mr. Joy, and some other formal defendants. The circumstances were shortly these: Mr. Birch, in 1812, contracted to purchase from Mr. Colhoun a certain estate for a sum of money, somewhere about 90,000 *l.*, and by that agreement, Mr. Colhoun undertook to convey to him free from incumbrances. Mr. Birch shortly afterwards ascertained, that among other incumbrances, of which he was not in the first instance aware, there were two annuities charged upon the estate, created by deeds dated, respectively, in the months of March and May 1800. Upon discovering those annuities, a second agreement was entered into between Birch and Colhoun, and that agreement provided for the discharge of certain incumbrances therein mentioned, but took no notice of the annuities granted to Joy, otherwise than that it provided, in case of Birch being called upon to pay those annuities, the manner in which he should stand creditor in respect of what he should so pay. That agreement does not make any provision with respect to the re-purchase of those annuities. Various transactions then took place, and at last it ended in Birch filing the bill against Colhoun and Joy, calling on Colhoun for a specific performance of the agreement for the sale of estate, and calling upon Joy to re-assign the term by which the annuities were secured, alleging that under the covenants for that purpose, contained in the annuity deeds, a proper notice had been given to Joy of an intention to re-purchase, and that circumstances had taken place, which amounted or were equivalent to payment to Joy of the consideration money of those annuities, and consequently the annuities had ceased, and Joy was bound to re-assign the annuities to the purchaser Birch. Answers were put in, no evidence was produced on the part of Birch, but several witnesses

were examined on the part of Joy (*r*). A decree was made by the Vice-Chancellor, the effect of which is to declare that the annuities, in consequence of what had passed, had actually ceased on the 5th of May 1824, and the decree uses an expression which it is important to notice, because upon that, I presume, the substance of the decree is founded; and with respect to that, I am under the necessity of saying, that I cannot in any degree concur. The decree declared, "That the annuities of 300 *l.* and 300 *l.* in the pleadings mentioned, ceased and determined on the 5th day of May 1824, when the notices to re-purchase the said annuities, stated in the decree to have been admitted by the Appellant G. Joy, by his answer to the original bill, to have been given by the said W. Colhoun to the Appellant G. Joy, expired." Upon that part of the decree, my Lords, depends the main question which your Lordships have to decide, namely, whether there was such a compliance with the terms for re-purchase contained in the annuity deeds, as could justify the Court in saying that the annuities did in point of fact expire, or that they are to be treated as having expired in May 1824.

With respect to that question, the facts appear to be of this nature. The bill alleges a power of attorney given by Colhoun to Mr. Coke and Mr. Hanrott, making them his attornies to do certain things; and in the course of the arguments at the bar, a good deal was said with respect to the particular wording of that power of attorney, and it was contended, that the general words there used, would entitle them to give the notice which is contained in these pleadings. But, my Lords, the first thing that occurs to me is,

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that I do not find anywhere—and I am happy to see counsel at the bar, who will set me right if I am wrong upon matter of fact—I do not find anywhere any evidence whatever of the existence of that power of attorney. I find no evidence called about it, and nothing like an admission in the answer. I do not see, therefore——

[Mr. *Sharpe* :—It was proved, *vivâ voce*, by proving the signature of the attesting witness (G. F. Syms), who is dead. The attesting witness was a party in the cause, and the handwriting was proved.]

The Earl of *Devon* :—Then under that power of attorney, Coke and Hanrott signed an instrument, being a notice of an intention to re-purchase the annuity at the expiration of the twelve months from that time, and the first question then would be, whether that notice was such a notice as entitled Birch, either in his own name, or making use of the name of Colhoun, to pay the money, and call for a re-assignment of the annuities; and another very important question is, whether—supposing the notices to be good—anything was done which amounts to an intention to pay, or can be taken as equivalent to payment of the consideration money of the annuities.

To take the last question first, I confess I cannot see upon what ground the House can judicially hold that that which took place (admitting it all to be as it is stated upon the part of Birch) amounted to anything like a payment, or what can be held equivalent to payment. I do not mean to involve the question in the technicalities of the law with respect to tender; but in order to make it payment, something ought to be done, which shows that he to whom the money

was to be paid, had distinct notice of the intention to pay at a certain time and place; and that it was his default that he did not receive the money. That I take to be the principle, and the only principle, upon which we could hold an offer of payment to amount to payment. I confess I am of opinion, that nothing appears on these pleadings, certainly nothing is admitted in the answer, which justifies that conclusion, and consequently we must say that the consideration money for the re-purchase of the annuities was not paid. The result of that would be, if we went no further, that the annuities are now subsisting annuities, and so far as respects that conclusion, I think that we must all concur. My opinion certainly is, that the annuities are now subsisting annuities, and that nothing has been done equivalent to re-payment.

Then comes the other question, whether—admitting that re-payment has not been made, or anything done equivalent to repayment—whether such a notice has been given as would entitle the party now to make the payment, the result of which might possibly be, if the House should be of that opinion, to make some difference in the order which we may make; the result may possibly be, that the party would be at liberty to make payment in virtue of that notice so given. With respect then to the notice, I certainly, during a great part of the argument, was rather disposed to take that view of the case; but upon looking more minutely and accurately into the pleadings and evidence, and what Mr. Joy says in respect to it, I cannot concur in that assumption in the decree, that Joy admitted the notice in that sense, in which effect ought to be given to it. What he says with respect to that notice, is accompanied and qualified by a distinct denial of any authority in the parties so to deal;

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The bill was filed by Mr. Birch against Mr. Colhoun, Mr. Joy, and some other formal defendants. The circumstances were shortly these: Mr. Birch, in 1812, contracted to purchase from Mr. Colhoun a certain estate for a sum of money, somewhere about 90,000 *l.*, and by that agreement, Mr. Colhoun undertook to convey to him free from incumbrances. Mr. Birch shortly afterwards ascertained, that among other incumbrances, of which he was not in the first instance aware, there were two annuities charged upon the estate, created by deeds dated, respectively, in the months of March and May 1800. Upon discovering those annuities, a second agreement was entered into between Birch and Colhoun, and that agreement provided for the discharge of certain incumbrances therein mentioned, but took no notice of the annuities granted to Joy, otherwise than that it provided, in case of Birch being called upon to pay those annuities, the manner in which he should stand creditor in respect of what he should so pay. That agreement does not make any provision with respect to the re-purchase of those annuities. Various transactions then took place, and at last it ended in Birch filing the bill against Colhoun and Joy, calling on Colhoun for a specific performance of the agreement for the sale of estate, and calling upon Joy to re-assign the term by which the annuities were secured, alleging that under the covenants for that purpose, contained in the annuity deeds, a proper notice had been given to Joy of an intention to re-purchase, and that circumstances had taken place, which amounted or were equivalent to payment to Joy of the consideration money of those annuities, and consequently the annuities had ceased, and Joy was bound to re-assign the annuities to the purchaser Birch. Answers were put in, no evidence was produced on the part of Birch, but several witnesses

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but what, I think, is of still more importance—whether they had a right to give that notice or not—is this: it appears all through that this notice professes to be given as the notice of Colhoun. The only piece of evidence that connects Colhoun with any knowledge of it at all (indeed, whether he was cognizant of it or not, we have no evidence in the cause) is, that before the time expired at which that notice was to be acted upon, he expressed his desire and intention that it should not be acted upon, but that another course should be taken—another course not at all unreasonable or immaterial, because, although Birch unquestionably had a right to have the estate free from incumbrances, it does not follow that he had a right to take that particular mode, and that particular mode only, of getting a re-assignment of the term. I am therefore further of opinion, that that notice cannot be treated as a notice upon which payment can even now be made.

The result must be, in that view of the case, (and that in fact is the whole of the case,) that the decree must be reversed so far as respects Mr. Joy. Mr. Colhoun's representatives have not appealed. But speaking of my own opinion (in the substance of which I hope my noble and learned friends concur) (a), I feel bound to say that I cannot think this decree right, and I must therefore be of opinion that it ought to be reversed, and I do not see how anything short of a reversal of the decree, *in toto*, will answer the justice of the case; except this, that there is a complaint in the appeal that the decree does not direct any account to be taken of the purchase-money. So far, I am disposed to think that the decree is right: I do not think upon these pleadings any account of

(a) Lord Lyndhurst had just entered the House.

the purchase-money ought to have been directed ; I merely throw out that suggestion, because it will affect the form of the order to be made. In point of form, if the House should concur in the view I have taken, and think that the decree should be reversed, then the costs paid, if they should be found to be paid under the Lord Chancellor's order, will be to be repaid. I will not further trouble your Lordships with other parts of the case. The truth is, that the whole case turns on those two points to which I have called your Lordships' attention.

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Lord *Lyndhurst* :—The point on which I concur in the opinion that has been pronounced by my noble and learned friend is this, that I do not think those circumstances, which are admitted in the answer of Mr. Joy, are sufficient to extinguish the annuities. Without saying anything as to whether or not the power of attorney to Coke and Hanrott, executed as it was for the purpose of giving the notice for terminating the annuities, was sufficient for that purpose, the service of that notice was, in point of law, a regular service, but after the notice had been served, then, at the expiration of the time required for the re-purchase of the annuities, it appears, according to the admission in Mr. Joy's answer (and there is no evidence in the cause except the answer),—it appears by the admissions in the answer, that Mr. Tooke and Mr. Syms attended at the house of Mr. Joy (there being no evidence whatever to show where Mr. Joy was at that time) for the purpose of tendering the money, and attended also for the purpose of tendering a deed of transfer of the annuities for Mr. Joy to execute; and Mr. Joy not being at home at the time, or the servant stating that he was not at home, they left the

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notice that is set out in the bill, and which notice is also admitted by Mr. Joy to have been left at his dwelling-house at the time in question. Now as the case appears to me,—and I have considered it at various times, first during the argument, and turning my mind to it from that time to the present, and considering what was urged by Mr. Wigram, and the cases which he cited,—I am still compelled to come to the conclusion, from which I have never in fact varied, that what has been done is not operative to extinguish the annuities; and I beg leave therefore to offer my humble opinion to your Lordships, founded on that, and that alone, that the circumstances so stated, and so admitted by the answer of Mr. Joy, with no other evidence in the cause, are not sufficient to have the effect of extinguishing the annuities that were granted by Mr. Colhoun to Mr. Joy. It does not amount to that re-purchase which alone can support the decree that has been pronounced by the Courts below.

The *Lord Chancellor*:—My Lords, It is a great satisfaction to me that the parties to this appeal have had the benefit of the attendance of the noble and learned Lords who have already expressed their opinions; and also of my noble and learned friend the Lord Chancellor of Ireland, who attended to the whole of the arguments, and has authorized me to say that he entirely concurs in the opinions just now expressed on this case. The Lord Chancellor of Ireland has also desired me to state that, in addition to the other reasons which might influence the judgment in this case, he entertains very great doubts whether, under the circumstances in which these parties were placed, it was competent for Mr. Birch to call on Mr.

Colhoun to exonerate the estate at the expense of repaying the whole of the 4,000 *l.* after two lives—one in each annuity deed—had expired, and under the circumstances of the parties as they existed when the notice was given.

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One object of the suit was to enforce a right of re-purchase contained in the annuity deeds, in these terms: "That in case William Colhoun, his heirs, executors, &c., shall, at any time after the 6th of March 1804, be desirous to re-purchase and buy up the said annuity, &c., and of such his or their intention shall give unto George Joy, his executors, &c., twelve months' notice, then George Joy, his executors, &c., shall, at the end of twelve months for which such notice shall be given, on receiving from W. Colhoun, his heirs, executors, &c., all sums due for arrears of said annuity up to the day of re-purchasing, &c., accept and take the sum of 2,000 *l.* in full for the re-purchase of said annuity, &c." It is a well-established rule, that under a clause of re-purchase of this description, being for the purpose of determining an interest, the terms of the proviso of re-purchase must be strictly complied with. That doctrine was clearly laid down in *Barrell v. Sabine* (t), and it was confirmed in a case, in this House, of *Ensworth v. Griffiths* (u). In *Davis v. Thomas* (x), Sir John Leach said, "Where there is no stipulation for penalty or forfeiture, but a privilege is conferred, provided money be paid within a stated time, there the party claiming the privilege must show that the money was paid accordingly." In *Barrell v. Sabine* it was held, "That where there is a clause or provision in the conveyance for the vendor to re-purchase, the time limited for that purpose

(t) 1 Vern. 268.

(u) 5 Bro. P. C. 184.

(x) 1 Russ. & Myl. 506.

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ought to be precisely observed." It was therefore necessary for the party claiming the right to re-purchase, strictly to comply with the terms of the provision; he was bound to give a regular notice, and he was also bound to pay according to that notice, unless he was prevented from doing so by the situation of the party to whom the notice was given, or who was to receive the money. He was bound therefore to show that he paid the money, or did do that which was equivalent in law to payment.

If your Lordships will look to the terms in which the transactions are stated in the bill, and to the way in which they are admitted in the answer, (that being the only evidence on which the decree proceeded, there being no evidence in the case on the part of Mr. Birch,) you will not fail to come to the conclusion, that there is a great want of those circumstances which are required to enable him to place himself in the situation in which, by the contract, he is bound to place himself in order to re-purchase the annuities. The statement in the bill is to the effect, that all attempts of Birch to re-purchase the annuities proving unsuccessful, and he being desirous of exonerating the estates from them, requested Colhoun, in performance of his agreement, to give Joy such notice as was required by the annuity-deed to enable Colhoun, or Birch in his place, to repurchase the same, and that such notice was accordingly given on behalf of Colhoun, the 16th of April 1823. The admission in Joy's answer to the statement is, that he, the defendant, has been informed by Colhoun, and believes, that the plaintiff did not request Colhoun to give the defendant such notice as in the bill in that behalf mentioned; and the defendant admits, that a notice signed W. Colhoun, by his attornies, was served on him, the

defendant, about the time in the bill mentioned. The answer does not refer to the bill for the purpose of adopting the statement of the notice in the way in which it is alleged in the bill; it merely says, that "a notice,"—not identifying the particular notice, or saying anything more on the subject of it than that a notice, signed "W. Colhoun," by his attorneys, &c., was served on him at the time in the bill mentioned.

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The next allegation relates to what was done at the expiration of the time specified in that notice. That allegation is, that "pursuant to such notice, and on the 5th day of May 1824, being the day for that purpose mentioned in the notice, Mr. Tooke, solicitor for Mr. Birch, and on his behalf, and Mr. Syms on behalf of Mr. Colhoun, went to Mr. Joy's residence, for the purpose of tendering 4,000*l.*, with all arrears of the annuities, and the costs and expenses incurred by Mr. Joy in recovering payment of the consideration money, and also for the purpose of tendering the deeds of transfer of the annuities for the execution of Mr. Joy; but Tooke and Syms being informed that he was from home, and gone to Jersey or Guernsey, they left at his house a written notice to the purport and effect following." It was incumbent on the plaintiff to prove, not merely that the notice was left at the house of the defendant, but to show something more, namely, that he did make a payment, or that he did that which the law considers equivalent to payment, namely, that he had made a sufficient tender of the money; that he had done all that it was incumbent on him to do, to entitle himself to the benefit of his contract. Now, what the defendant says, and his statement is the only evidence in the case upon this point, is, "and the defendant says he admits it to be true that notice, signed W. Colhoun, by his

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attornies E. Coke and P. A. Hanrott, was served on him at or about the time in the bill, in that behalf mentioned; but the defendant says, he always protested against the authority of the said E. Coke and P. A. Hanrott to interfere in the concerns of the said W. Colhoun, he the defendant having previously thereto received from W. Colhoun an irrevocable power of attorney."

These circumstances were in no way brought before the Court of Chancery by the defendant there. Coupled with the admission of the notice by the defendant Joy, in his answer, is this statement: That two persons gave that notice in behalf of Colhoun, and that Joy always disputed their power to do so, as he had from Colhoun an irrevocable power of attorney of an earlier date. The answer goes on thus: "And this defendant says, that the said Edward Coke, in a letter to this defendant, dated 27th November 1820, informed this defendant that he, Edward Coke, would not act under a power of attorney which Mr. Syms had unduly persuaded Colhoun, without the knowledge of Edward Coke, to execute to him; and Edward Coke, in a subsequent letter to defendant, dated in May 1824, informed defendant that he, Coke, considered the defendant knew for years that he, Coke, had not concerned himself with the affairs of Colhoun, neither should he then; and the defendant, therefore, believes that the signature of Edward Coke to such notice was incautiously or surreptitiously obtained, and Colhoun informed defendant that he, Colhoun, had no knowledge of such notice, and had not given instructions to the said Coke and Hanrott to give the same on his behalf." The defendant, in his answer, says, that "after the said notice had been given, and before the time mentioned

therein had expired, W. Colhoun had settled his accounts with defendant, admitting that the notice was not available, &c., and he, Colhoun, executed to the defendant an assignment of all his right and interest in the purchase-money for securing to the defendant the payment of the amount due to defendant on the settlement of such accounts." "And this defendant further answering, says, he is informed, and believes, that pursuant to such notice, and at or about the time in the bill mentioned, Mr. Tooke, on the behalf of the complainant, and Mr. Syms, pretending to act on the behalf of W. Colhoun, but, as this defendant believes, without his knowledge or any authority from him, did go to defendant's residence in New Ormond-street, for the purposes in the bill mentioned. And defendant believes that the day in the bill in that behalf mentioned, was the day, in the said notice mentioned, for the re-purchase of the said annuities; and that Mr. Tooke and Mr. Syms were then informed, as the fact was, that defendant was then from home. But this defendant says he does not know, and cannot set forth, as to his belief or otherwise, whether they were informed that this defendant was gone to Guernsey or Jersey; this defendant having been previously at the island of Jersey, but having left the same about three weeks before such inquiry was made. And defendant further answering, says, he has understood, and believes it to be true, that at the time in the bill in that behalf mentioned, Mr. Tooke and Mr. Syms did leave, at the house of this defendant, such written notice as in the bill in that behalf mentioned, to which said notice, when the same shall be produced to this Honourable Court, this defendant craves leave to refer." That was the only passage by which the plaintiff attempted to prove that he had done

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that which he was required to do, to place himself in a situation to determine the further payment of the annuities. Now, the notice, as stated in the bill (supposing that to be sufficiently admitted in the answer), is entirely silent as to the place where the money was to be paid, and the provision in the deed is the same; but it is a well-established rule, that where that is the case, it is incumbent on the party giving the notice of the intention to repay, to specify the place at which he intends to make the payment. It was at one time a question whether, when a place was not stated, it was not incumbent on the party about to make the payment to seek out the individual to whom it was to be made, and to make a personal tender of the money to him; but it has since been determined, that where none is mentioned, the party to make the payment may specify a place of payment, and the other party is bound to take notice of the place specified. In this instance no place was specified, and there is nothing to show, even if all the circumstances alleged by the plaintiff really occurred, that the house of the defendant was the place at which the plaintiff was entitled to make the tender. There is, besides, an omission of all the facts which go to constitute a legal tender; the fact admitted, and the only fact admitted, being, that the party left the paper at the house of Mr. Joy. But there is another circumstance to which I must call your Lordships' attention: the payment, to be good, must be accepted by the execution of a deed. There is no statement, and therefore there could be no proof that any previous step had been taken to inform Joy of the nature of the deed he was to execute. Yet in *Wiltshire v. Smith* (y) it

(y) 3 Atk. 89.

was decided, not only that a deed must be prepared and tendered, but that the party may refuse to receive the money and to execute the deed, till he has had the opportunity of advising with his attorney whether he may safely execute it. There is, therefore, throughout an absence of all those circumstances which could entitle either Birch or Colhoun (supposing the transaction be considered as the transaction of Colhoun) to determine the annuities. There are other grounds, independent of those which I have now stated, and which might lead me to the same conclusion; but being quite satisfied upon the facts as far as I have stated them, that no ground whatever has been made out to determine these annuities, it is unnecessary for me to observe on the other facts of the case.

This makes it necessary now to consider what, under existing circumstances, is proper to be done with this decree. The decree is in these words: "And it was declared that the annuities of 300*l.* and 300*l.* ceased and determined on the 5th of May 1824, when the notices to re-purchase the said annuities stated in such decree to have been admitted by the Appellant, by his answer to the original bill, to have been given by W. Colhoun to the Appellant, G. Joy, expired; and it was ordered that it should be referred to the Master to take an account of what remained due to Joy for the arrears of the annuities which accrued due, up to the 5th of May 1824. And it was declared that Mr. Birch was entitled to a reconveyance of the terms created for the security thereof, upon payment to Joy of the sums of 2,000*l.* and 2,000*l.* for the purchase-money of the said annuities, and also upon payment of what should be found due for such arrears thereof."

If your Lordships concur in the view which I have ventured to suggest with respect to the merits of this

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decree, it is clear that all this part of the decree must be reversed. If it be reversed (and the other parts of the decree not affecting Mr. Joy, are not now before us, they merely refer to the accounts as between the vendor and purchaser), the result will be that the estate will remain subject to the annuities. If, therefore, there is nothing to affect Mr. Joy's interest, but he stands in the situation of an annuitant as to these two sums of money, the bill would properly be dismissed as to him, because then the only subject matter as to which he could be made a party to the bill, would fail, and he would be entitled to be dismissed from the suit. But it is not his interest to be altogether dismissed from the suit, and what appears in the case makes it necessary that he should continue as a party to the cause; because, although what has taken place could not affect the interests of Mr. Birch, inasmuch as all the transactions were subsequent to the contract with him, which was made in 1812, yet various transactions took place afterwards between Mr. Colhoun and Mr. Joy, which make it necessary that Joy should remain a party to the cause, for the purpose of receiving out of the purchase-money which Birch may have to pay, those sums which, by his subsequent arrangements with Colhoun, he may be entitled to receive. This being a question between two co-defendants, could not be the subject of adjudication at the hearing, but may properly be the subject of inquiry at a future period; and it is necessary that some inquiry should be made, in order that it may be ascertained what ought to be done with the purchase-money, when that money is paid.

There is another question, which I will not enter into farther than for the purpose of showing what the claims in this case are, because, being a question

between co-defendants, I apprehend that your Lordships will be of opinion, that the proper course will be to leave all such matters as open as possible, and merely to put them into a train of inquiry, by which the rights of the parties may be properly worked out. Passing, therefore, partly over this question, I shall merely say that it appears that, in 1818, letters passed between Mr. Joy and Mr. Colhoun, which on the part of the former have since been contended to amount to notice to the latter to pay interest on the arrears of the annuities; it also appears that, in 1824, a deed was made, by which, at all events (this deed not being impeached as between Colhoun and Joy), Joy claimed the benefit of the interest then existing on the arrears of the annuities. To what extent Joy may be entitled to work out these several claims, is matter to which the decree at the hearing ought not to extend further than by referring it to the Master to inquire whether Joy had any, and what lien or claim on the purchase-money, which would, under the contract, have to be paid by Birch to Colhoun; with that, however, Birch has nothing to do, as it only affects the sum which would come to Colhoun. I should therefore, submit to your Lordships' consideration whether the proper course would not be to reverse so much of the decree as affects the interests of Joy, and then to refer the cause to the Master to inquire whether Joy has any and what *lien* upon, or claim to, any portion of the purchase-money which would be payable by Birch to Colhoun.

The only other part of the case affecting the interest of Joy, to which it is necessary to call your Lordships' attention, is that part of the decree which directs Joy to pay costs. If your Lordships adopt my opinion, you will order the re-payment of these costs, which will

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bring them back to that situation in which they would have stood, if the decree I now propose, had been pronounced in the Court below. I therefore move that the decree be reversed, and that the inquiry which I have suggested be substituted.

The order made was as follows :—

It is *ordered* and *adjudged*, &c. that so much of the said decree, &c. complained of in the appeal as declares that the annuities of 300 *l.* and of 300 *l.* in the pleadings mentioned, ceased and determined on the 5th of May 1824, when the notice to re-purchase the said annuities, stated in such decree to have been admitted by the defendant G. Joy, by his answer to the original bill, to have been given by the defendant W. Colhoun to the said G. Joy, expired ; and as orders that it be referred to the Master, &c. to take an account of what remained due to the said G. Joy for the arrears of the said annuities, which accrued due up to the said 5th of May 1824 ; and as declares that the said plaintiff W. Birch, was entitled to a re-conveyance of the terms created for the security thereof, upon payment to the said G. Joy of the sums of 2,000 *l.* and 2,000 *l.* for the purchase-money of the said annuities, and also upon payment to the said G. Joy of what should be found due for such arrears thereof, be and the same is hereby reversed.

And it is further *ordered* and *adjudged*, that the said order of the 10th of August 1831, whereby it was ordered that so much of the said decree be affirmed, with costs, &c. be and the same is hereby reversed, &c.

And it is further *ordered*, that so much of the bill as prayed that it might be declared that the two several annuities of 300 *l.* and 300 *l.* charged on the estates thereinbefore named, or thereinbefore mentioned, ceased and determined on the 5th of May 1824 ; and that an account might be taken, &c. of the arrears of the said annuities respectively, which accrued due on and prior to the 5th of May 1824, and of the costs and expenses reasonably incurred by the defendant G. Joy, in respect of such arrears ; and that upon payment of what should be due on the two several sums of 2,000 *l.*

and 2,000 *l.* to the said G. Joy, and which the said W. Birch thereby offered to pay, the defendants G. Joy, H. H. Joy, and Elizabeth Joy, might be decreed to make and execute all deeds, and do all such acts as might be necessary to reconvey, &c. the said two annuities, and all securities for the same, to the said W. Birch; and that in the mean time the said G. Joy, H. H. Joy, and Elizabeth Joy might be restrained, &c. from commencing or prosecuting any action or actions at law, &c. against the said W. Birch, or the said estates, &c., or the tenants thereof, for compelling payment of the said annuities, &c. be and the same is hereby dismissed, with costs, &c.

And it is further *ordered*, that it be referred to one of the Masters of the said Court of Chancery to inquire whether the defendant G. Joy has any, and what claim to or lien upon any part of the purchase-money to be paid by the said plaintiff W. Birch to the said defendant W. Colhoun, &c.; and after the Master shall have made his report thereon the said Court of Chancery do proceed further in the said cause, as shall be just and consistent with this judgment.

68 Journ. pp. 64, 65.

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A P P E A L

FROM THE COURT OF CHANCERY.

WILLIAM HOLMES - - - - - *Appellant.*

THOMAS HENTY, JEREMIAH LEAR, JOHN
LEAR and ROBERT FRENCH; and also
JAMES HOPKINS, JOHN COLE TOMP-
KINS, and HENRY JAMES PARSONS - } *Respondents.*

May 31.

By the 22d sec. of the Act 9 Geo. 4, c. 92, "an Act to consolidate and amend the laws relating to Savings' Banks," it was ordered, "That within six weeks after the 20th of November 1828, the trustees and managers of the different

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Savings' Banks then established, should ascertain the amount of the increased funds of their respective banks up to the said 20th of November, and should as soon afterwards as conveniently could be, after retaining so much as might be necessary for the future management of the said Savings' Banks respectively, appropriate the same in the manner provided for by their respective rules and regulations made before the passing of that Act; or in the event of no provision having been made by such rules and regulations, then in such manner as the trustees or managers, or the major part of them, at any general meeting convened according to the respective rules and regulations of such Savings' Banks, should think fit.

The increased fund of a Bank called the Arundel Provident Bank (established in 1818), up to the 20th of November 1828, was ascertained to amount to 742 *l.* 15 *s.* 11 *d.* The rules and regulations of the Bank did not contain any direction as to the mode of applying this surplus, but by one of the rules, and also by the said Act, the trustees and managers were not to have any benefit from the application of it. Previous Acts repealed and consolidated by this Act, provided that the surplus should be disposed of among the depositors, as the trustees should think fit. The majority of the trustees of the Arundel Provident Bank, present at a general meeting regularly convened, resolved to appropriate 592 *l.* 15 *s.* 11 *d.* of the surplus, to the widening of the bridge on the river Arun, and the same was paid over accordingly to one of themselves, who was bridge-master.

Held by the Lords (affirming an order and decree of the Court of Chancery), that this was a misapplication of the fund, and a breach of trust, and though the money was expended on the bridge, the parties were held personally liable to refund it.

IN March 1831, the Respondents, Thomas Henty and Jeremiah Lear, on behalf of themselves, and all others trustees of the Arundel Provident Bank, and John Lear and Robert French, on behalf of themselves,

and all others depositors in the said bank (except the defendants to the suit), exhibited their bill in Chancery against the Appellant, and the Respondents, James Hopkins, John Cole Tompkins, and the Rev. Henry James Parsons, thereby stating, that in the month of May 1818, certain persons formed a society in Arundel, Sussex, for maintaining and establishing an institution, in the nature of a bank, to receive deposits of money, for the benefit of the persons depositing the same, conformably to the then existing law, and that such society was named "The Arundel Provident Bank," and was intended for the encouragement of industry, economy, and independence, by affording a secure investment for such small sums of money as might be raised from the earnings of servants, mechanics, and others, of Arundel and its vicinity; that in order to encourage the said institution, small deposits were made therein by a great number of persons of property in the neighbourhood, and that rules and regulations for the management thereof were duly formed from time to time, whereby the property and management of the said institution or savings' bank, were vested in certain trustees, who generally were upwards of fifty in number; that at a general meeting of the trustees, held on the 27th of November 1828, it was resolved, that certain rules and regulations, then adopted, should be the rules and regulations of the Arundel Provident Bank, in lieu of those at any time theretofore agreed upon, and that among such rules and regulations were the following:—

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"1. The management of this institution shall be vested in not less than twenty trustees, who shall have power to add to their number.

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“ 2. No trustees or other persons having any control in the management of this institution (except the actuary), shall derive any benefit from any deposit made by them.”

“ 7. A committee of eleven trustees, any two of whom shall have power to act, shall be annually appointed, and the duty of this committee shall be to superintend the accounts of the bank, &c.; they shall also be authorized to report to the trustees their opinion on any plan or suggestions relative to the general management of the institution.”

“ 19. All sums received by the trustees are to be deposited with the treasurer, and invested in the Bank of England in the name of the Commissioners for the Reduction of the National Debt, leaving such balance only in the hands of the treasurer as may be deemed necessary to answer the expenses of the institution.”

“ 33. The accounts of the bank shall be made up and balanced to the 20th of November in every year, and a statement of such balanced accounts attested, &c. shall be transmitted to the Commissioners for the Reduction of the National Debt within six weeks,” &c.

“ 35. No alteration shall be made in any of the foregoing rules and regulations without a month’s notice to each trustee, that such alteration is intended to be proposed, and no alteration shall be valid unless made at a meeting where five or more trustees are present.”

The bill also stated that a transcript of the said rules and regulations was duly submitted to the Barrister appointed in that behalf by the Commissioners

for the Reduction of the National Debt, who certified that they were in conformity with the provisions of the Act 9 Geo. 4, c. 92, entitled, "An Act to consolidate and amend the Laws relating to Savings' Banks;" that in 1824, and from that time down to the present year (1831), the Appellant and the Respondents Hopkins, Tompkins, and Parsons, had been and still were trustees of the said savings' bank, and Hopkins, since November 1828, had been and then was the treasurer thereof, and that the trustees were upwards of fifty in number, too numerous to be made parties to the suit; and that the Respondents (the plaintiffs in the suit) had been since 1824, and then were, either trustees or depositors, or both, in the said savings' bank, and that by the said rules and regulations, and also by the Act of Parliament before-mentioned, all monies, effects, and securities for money belonging to the said institution, were vested in the trustees for the time being, for the use and benefit of the institution, and the depositors, their executors, &c.

The bill further stated, that shortly previous to the 20th November 1828, the trustees of the said savings' bank ascertained the amount of the increased stock or funds thereof, up to the said 20th of November, to be 742*l.* 15*s.* 11*d.*; that many of the trustees and depositors resided at considerable distances from Arundel, and on the 13th of November 1828, a meeting was held at Arundel, at which a few only of the trustees attended, and the Appellant and the Respondents Hopkins, Tompkins, and Parsons, procured a resolution to be passed, by which it was ordered, that after retaining 100*l.* towards the future expenses and management of the institution, 50*l.*, part of the said increased stock, should be paid to the

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free school of Arundel, and 592*l.* 15*s.* 11*d.*, being the residue of the said stock, should be paid to the Appellant and the said Respondents, for paying the expenses of widening the public bridge over the river Arun, at Arundel; and that a like resolution was alleged to have been assented to at some meeting of the said trustees, held on or about the 11th of December 1828; That the said sums of 50*l.* and 592*l.* 15*s.* 11*d.*, had accordingly been paid over to the Appellant and the said Respondents, and they had paid the 50*l.* to the fund of the national school, and threatened and intended to pay the 592*l.* 15*s.* 11*d.* in repairing the bridge, but that the said last-mentioned sum was still in their hands.

The plaintiffs by their said bill further stated that they did not concur in the said resolution; and that when they first heard of the same, which was not till a considerable time after it had been adopted, they were greatly astonished, and some of them at the next meeting of the trustees remonstrated with the Appellant and the Respondents Hopkins, Tompkins, and Parsons, against the impropriety of it, and suggested, that if the increased stock was to be touched, the same ought to be applied to some purpose substantially beneficial to the institution, or to the depositors; and the said remonstrances were repeated from time to time, up to December 1830, but they were disregarded by the Appellant and the Respondents Hopkins, Tompkins, and Parsons. And the bill stated that the Respondent Henty took the opinion of the Barrister appointed for the purpose of the said Act, as to the propriety of the said proceedings, and was by him advised that the application of the 50*l.*, and the intended application of the 592*l.* 15*s.* 11*d.*, were misapplications of the funds

of the institution, and contrary to law. And at a meeting of the trustees, held on the 20th of December 1830, Henty and Jeremiah Lear read, in the presence of the Appellant and the Respondents Hopkins, Tompkins, and Parsons, the case submitted to the aforesaid Barrister, and his opinion thereon; but the Appellant and the said Respondents replied to this effect, "We have got the money, and you (meaning the plaintiffs) may get it away from us, if you can."

The bill charged, that the said bridge at Arundel was a great public thoroughfare, and that the expenses of keeping it in a proper state ought in law to be borne either by the corporation of Arundel, or by the corporation and inhabitants jointly, and that the Appellant and the Respondents Hopkins, Tompkins, and Parsons, were respectively owners of property in Arundel, which would be chargeable in respect of the expense of repairing the said bridge, and that the Appellant and the said Respondents, except Parsons, were members of the corporation of Arundel, and that the Appellant held the office of bridge-master of the said bridge; and that by misapplying the property of the said institution to repairing the said bridge, the Appellant and the said Respondents would acquire a personal benefit to themselves. And the bill further charged, that if any of the other trustees concurred in the said resolution it was only on the condition that the money was not to be so applied, unless one of His Majesty's counsel should be of opinion that the proposed application of it was legal. That no such opinion was given, but on the contrary, the counsel consulted gave an adverse opinion. And the Appellant and Respondents Hopkins, Tompkins, and Parsons were well aware of the illegality of the proposed applica-

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tion of the said funds, and the Appellant submitted a case and an amended case to a King's counsel, but withheld his opinion from the other trustees. And the bill further charged, that the meeting of trustees at which the said resolution was passed was not duly called, and that due notice was not given thereof, or of its being intended to propose any such resolution touching the disposal of the said increased fund; and that the said resolution was passed informally and irregularly, and was contrary to the fundamental institution of the said society, and a violation of the trusts thereof, and that none of the trustees of the said savings' bank other than the Appellant and the Respondents Hopkins, Tompkins, and Parsons, were willing that any part of the increased stock of the said bank should be applied in the manner directed by the resolution. And the bill further charged, that in none of the accounts which had been rendered to the Commissioners for the Reduction of the National Debt by the trustees of the said bank, and which had been open to the inspection of the depositors, did any entry appear showing the application of the said sums of 50*l.*, or 592*l.* 15*s.* 11*d.*, and that the Appellant and the said Respondents, and particularly Hopkins the treasurer, had gotten into their possession the books, accounts, documents, and papers relating to the said savings' bank, and the matters in the bill mentioned, and had excluded the plaintiffs from the use and inspection thereof.

The bill prayed that it might be declared that the Appellant and the Respondents, Hopkins, Tompkins, and Parsons, were trustees of so much of the said increased stocks or funds as had been so paid over to them, or otherwise placed at their disposition, for the use and benefit of such institution and the respective

depositors therein ; and that they had been guilty of a breach of trust in paying thereout the said sum of 50 *l.* to the said national or free school, and that the application of any part of the said increased stock to the purposes of widening or otherwise repairing and improving the said bridge, would also be a breach of trust ; and that an account might be taken of all sums of money or stock in the public funds, being part of the increased stock or funds which had been received by them, or transferred into their names ; and that they should be decreed to pay what should be found due from them upon such account, either to the trustees of the said savings' bank, or as the trustees should direct, or to the Commissioners for the Reduction of the National Debt ; and that they might be removed from being trustees of the said savings' bank, and that Hopkins might be removed from being treasurer thereof, and that they might be ordered to pay the costs of the suit, and be restrained in the mean time from applying the said sum of 592*l.* 15*s.* 11*d.*, or any other part of the increased stock or funds of the said savings' bank, towards the defraying the expenses of the widening or otherwise improving and repairing the said bridge at Arundel.

The Appellant and the Respondents, James Hopkins and John Cole Tompkins, put in a joint and several answer, and thereby admitted the formation of the bank for the objects in the bill mentioned, and the rules and regulations for its management, as therein stated ; and that they and the Respondent Parsons were trustees of the bank from the year 1824 ; and that Hopkins was treasurer from the year 1828 ; and also that the Plaintiffs, except Henty, were trustees or depositors, but that Henty was neither trustee or depositor, and they therefore submitted that he had no

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claim on them in respect of the matters in the bill mentioned ; and by their said answer they admitted, that by the said rules and regulations, and by the Act of Parliament in the bill mentioned, all the monies, effects, and securities belonging to the said institution, except the residue of the increased stocks or funds, after deducting thereout the expenses, as in the said Act is directed, were vested in the trustees for the time being, for the use and benefit of such institution, and the respective depositors, &c. ; and that at a general meeting of the trustees, on the 11th of November 1828, the trustees present at such meeting, ascertained that the increased stock or fund would, on the 20th day of November 1828, amount to the sum of 742 *l.* 15*s.* 11 *d.* ; and they said that the said increased stock or fund was so ascertained, in pursuance of the 22d section of the said Act (9 Geo. 4, c. 92), whereby it is enacted, “ that within six weeks after the 20th of November 1828, the trustees and managers of the different savings’ banks already established in England and Ireland, shall ascertain the amount of the increased stocks or funds of their respective banks, up to the 20th of November 1828, and shall, as soon after as conveniently can be, after retaining so much thereof as might be necessary for or towards the future purposes and management of the said savings’ banks respectively, appropriate the same in the manner provided for by their respective rules and regulations made before the passing of this Act ; or in the event of no provision having been made by such rules and regulations, then in such manner as the trustees or managers or the major part of them assembled at any general meeting to be convened according to the respective rules and regulations of such savings’ banks shall think fit and proper.”

The Appellant and the Respondents, Hopkins and Tompkins, by their said answer further stated, that they were advised, and submitted that inasmuch as it was not provided by the rules and regulations of the said bank, made before the passing of the said Act, how any such increased stocks or funds were to be disposed of, the trustees were empowered to dispose of and appropriate such increased stocks or funds so ascertained, up to the said 20th November 1828, in such manner as the major part of them, assembled at a general meeting, should think fit and proper; and that they were trustees of such increased stock or fund, for such purposes as should be so determined on, and not otherwise, for the said bank, or the depositors therein; and they further stated, and admitted, that on the 13th November 1828, the 27th November 1828, and the 11th of December 1828, general meetings of the trustees were held at Arundel; and such meetings were called in the way that all the general meetings of the said trustees were usually called, and were held at the usual place of meeting, and that ten of the said trustees (including the Appellant, Hopkins and Parsons) signed the proceedings of the 13th November; and eleven of them (including Parsons and Tompkins) signed the proceedings of the 27th November; and eight of them (including Parsons, the Appellant and Hopkins) signed the proceedings of the said meeting of the 11th December 1828: and by their said answer they further stated, that they believed that there were several trustees present at each of the said last-mentioned meetings, who joined and voted in the proceedings that then took place, but who did not wait to sign, or did not sign the resolutions and proceedings of such meetings, as was frequently the case at the meetings of the said trustees;

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and that the trustees who attended at the said meetings were a majority of the whole number of the then acting trustees of the said bank; and they believed that the number of trustees who were present at the meeting of the 11th of December, amounted to thirteen or fourteen at least; and that the whole number of trustees, exclusive of those who were elected at that meeting, and who were not trustees for the purposes of it, did not exceed thirty, of whom seven had then removed to such distances as prevented them from acting, and several others had not acted for a considerable time previously to such meeting.

And by their said answer they further said, and particularly the Appellant said, that he having received a notice calling a general meeting of the trustees on the 13th November 1828, attended at such meeting; and after much discussion respecting the then intended new rules, and other matters, the manner in which the increased stock should be disposed of was talked about, and no specific plan of applying it was proposed; but it was then mentioned by some of the trustees, and considered to be contrary to the Act of Parliament, and the rules and regulations under which the said savings' bank was carried on, to distribute the increased stock among the depositors, inasmuch as many of the trustees being also depositors, would then have received benefit from such distribution; and the Appellant at such meeting said, that if no other trustee proposed any other better plan for disposing of such increased stock, he would propose that the same should be applied towards widening Arundel Bridge, when the proper time for disposing of it arrived; and by their said answer the Appellant and Hopkins and Tompkins said they and Parsons attended at the general meeting of trustees, held on the 27th

November 1828, when again the manner in which the increased stock should be disposed of was discussed, and no mode of disposing of the same was proposed, or any determination come to, further than that it should be disposed of at the next general meeting, and that the Appellant then said to several trustees that he would propose at the next general meeting, that one-fourth part of the increased stock should be retained for the future purposes of the bank, and that the residue should be applied for widening the said bridge; and that it was at the said last-mentioned general meeting ordered, that a general meeting should be summoned for Thursday, the 11th of December then next: and in pursuance of such order, a general meeting of the trustees was duly called, and at the said meeting much discussion took place, as to the disposal of the said surplus, and it having been proposed and unanimously agreed on, that 100*l.* should be retained for the future purposes and management of the said bank, and 50*l.* allowed for arrears of rent and firing to the said Arundel school, it was then, after much discussion on the subject, proposed by the said Tompkins, and seconded by the Appellant, that, after retaining the 100*l.*, and allowing the 50*l.*, the residue of the said surplus should be applied for the purpose of widening the said bridge; and the said proposal being at the request of M. A. Tierney, one of the trustees, who appeared to object thereto, put to the vote, the same was carried by a majority; and the said Tierney having stated a doubt, whether the law would permit such a disposal of the money, the Appellant proposed that the opinion of Counsel should be taken on the subject, and that in case the Counsel should be of opinion that such an appropriation of the money was not authorized, it

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should be disposed of at the next annual meeting by a majority of the trustees, and that in the meantime the money should be withdrawn, and put into the names of trustees, which last-mentioned proposal was unanimously agreed to ; and ultimately it was, at the said meeting of the 11th of December 1828, resolved “ That the sum of 100*l.* be retained, for or towards the future purposes and management of the bank, that the sum of 50*l.* be paid for arrears of rent and firing of the fund of the Arundel school, that the remaining sum of 592*l.* 15*s.* 11*d.* be paid over to the Rev. H. J. Parsons, W. Holmes, J. Hopkins and J. C. Tompkins, Esqrs., for the purpose of paying the expense incident to the widening of the public bridge over the river at Arundel, and that in case Counsel should be of opinion, that the trustees are not so authorized to dispose of the money, the same be disposed of in such manner as the trustees and managers present, or the major part of them, at the annual meeting in the month of November 1829, shall order. And by their said answer, they further said, that in pursuance of the said resolutions, a case, and an amended case, were prepared on behalf of the trustees, and laid before Counsel for his opinion, as to the proposed appropriation of the said surplus, and that the said Counsel was of opinion, that the same would be a proper appropriation thereof. And at the general meeting, on the 21st day of November 1829, the said case, and amended case, together with the opinion of Counsel thereon, were produced and read, when the Respondent, Henty, expressed a wish for a further opinion, and induced the chairman to put the question to the vote, which was accordingly done, and out of all the trustees then present, about fourteen in number, Henty stood alone in his vote for such further opinion.

And by their said answer, they further said they believed that the 50*l.* had been paid to the fund of the said national school, in pursuance of the said resolutions, and they admitted that the 592*l.* 15*s.* 11*d.* had been paid into the hands of the Appellant, for the purpose of being applied by him, acting for himself as one of the trustees, and as bridge-warden, and on behalf of the Respondents Hopkins, Tompkins and Parsons, as such trustees for the purposes directed by and in pursuance of the said resolutions, and that the Appellant had applied part, and intended to apply the residue of the said sum of 592*l.* 15*s.* 11*d.* in widening the said bridge, and that the said sum was, subsequent to the meeting of the trustees on the 13th day of December 1830, received by the Appellant as bridge-warden, for the purpose of applying it towards the widening of Arundel Bridge, and that he had expended divers sums of money, amounting to 150*l.* at least, towards carrying the said resolution into effect, and would in a short time expend upwards of the said sum of 592*l.* 15*s.* 11*d.*, and that he had contracted for, and procured divers articles and materials for widening the said bridge on the credit of the last-mentioned sum. And they said that at the meeting on the 13th of December 1830, Henty produced the opinion of Counsel as in the bill stated, and read the same, as well as the case submitted, when the Appellant observed that such case was wrongly stated, and that the money was already disposed of, and must be applied as it was ordered, and the trustees had no control over it; and that another meeting was, on the application of Henty and Jeremiah Lear, held on the 20th of December 1830, when the proposition was discussed, whether a further opinion of Counsel should be taken, and all the trustees pre-

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sent at that meeting, except the said Lear and Henty, were against the proposition.

And by their said answer, they denied that it was the fact, that no such rent as in the bill mentioned was due to the said school, for they said they believed that some such rent was due, as none had ever been paid for the use of the building in which the business of the said bank was carried on, nor had any thing ever been paid for the fuel used by the said society, both of which had been supplied by the said school. And by their said answer, they further said that the Appellant was, in October 1830, elected mayor of Arundel, and that the mayor of Arundel for the time being is bridge-warden, and always has the superintendence and management of the said bridge, and he repairs the same from two sums of money of 2*l.* and 3*s.* payable annually by the owners of certain houses therein mentioned, and if those sums were not sufficient, then the deficiencies had been for many years past paid for the repair of the said bridge by the overseers of the parish of Arundel, either to the bridge-warden or to the persons to whom the bills might be owing for the repair thereof. And they believed that the said houses were respectively by law liable to the payment of the several sums of 2*l.* and 3*s.* for the repair of the said bridge, and that the corporation of Arundel had never paid, or been liable to pay, any thing towards the repair of the said bridge, and were no otherwise interested in its repair, than as owners of about one hundred acres of land in the parish of Arundel, being about one one-hundredth part of the annual value of the said parish. And they admitted that they were either occupiers or owners of property in the parish of Arundel, as well as in the rape of Arundel, and out of the said parish of Arundel, and

in other parts of the county of Sussex, and that they were members of the corporation of Arundel. And they denied that any persons were in law liable to widen the said bridge, and that by the said sum of money being applied in manner aforesaid, they would acquire a personal benefit to themselves. And they insisted by their answer, that the majority of the trustees concurred in the said resolutions, and they denied that they knew or believed that the proposed application of the funds was illegal or a violation of the trusts of the bank, but they believed that such application was authorized by the 22d section of the Act 9 Geo. 4, c. 92. And they denied that there did not appear in any of the accounts which had been submitted to the Commissioners for the Reduction of the National Debt by the trustees of the said bank, any entries showing the intended application of the said 50 *l.* and 592*l.* 15*s.* 11*d.* to the purposes therein before in that behalf mentioned.

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The Respondent Henry James Parsons put in a separate answer, which, amongst other things, stated that he assented to the said resolutions for disposing of the said surplus, and was, as far as his knowledge of the circumstances in the bill mentioned extended, substantially to the same effect as the answer put in by the Appellant and the Respondents Hopkins and Tompkins.

Soon after the answers were filed, a motion was made on behalf of the plaintiffs in the cause, before the Lord Chancellor, for an order on the Appellant to pay into Court the said sum of 592 *l.* 15*s.* 11*d.* admitted by him to have been paid over to him.

The *Lord Chancellor* (a), in giving his judgment,

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said, This was a motion that four out of seventeen trustees, those four being the only defendants, should pay money into Court, that money being the sums which they admitted they had received, and in whole or in part expended according to the decisions of the trustees, convened at an ordinary general meeting, without special notice, and at which meeting the question had been raised, how the surplus funds of the bank, in their hands, should be disposed of. Now, I am of opinion, upon the best consideration I have been able to give to the case, (as to the great importance of which I entirely agree,) that, if it is clear that the trustees had no right to apply the money in the way in which they did apply it, I am entitled to call upon those four who are at present before the Court, or one of them, (I think the motion is made against Mr. Holmes,) to pay that money into Court. The question is, whether it be clear that that application of the money, though *bond fide*, and without any imputation upon the conduct of these gentlemen—whether it was, technically speaking, and upon the construction of the Act of Parliament, a misapplication of the trust funds: and upon the best consideration that I have been able to give to this case, I have no doubt that it was a misapplication of these funds. That this question is of some importance, and would be of greater importance if it related to the construction of the 23d and other sections of the Act which apply prospectively, and which go on to be in force up to this hour, there can be no doubt; but as I understand it, the surplus which has been applied in the manner in question, was a surplus which they were to apply within six weeks after the 20th of November 1828; it was the preceding surplus which had arisen before the Act came into operation, and no question is now

raised with respect to what may be called the new growing surplus subsequent to the 20th of November 1828. That is provided for in section 23, and the preceding surplus is provided for in section 22, consequently, this case is of less importance, and any opinion I may come to, whatever may be its value, would be of greater importance had I been dealing with a much larger subject—with the prospective provisions of the Act. The surplus arises chiefly—not entirely—from the difference between the $2\frac{1}{2}d.$ per cent. per day interest, which is obtained on the deposits in the hands of the Commissioners for the Reduction of the National Debt, and the $2\frac{1}{2}d.$ per day, which is the maximum interest allowed by the Act to be paid to the depositors, making the difference of one farthing in ten, or one-tenth part of the whole interest, receivable upon the deposits in all the savings' banks in the country. Now as to the deposits in savings' banks, according to the late report laid before Parliament by the proper officer, who is the barrister under whom the administration of these very important concerns is placed, they appear to amount to somewhere about 13,000,000 *l.* sterling, which at 3*l.* 16*s.* 8*d.* per cent. per annum, which $2\frac{1}{2}d.$ a day amounts to, would make a revenue of 494,000*l.* a year interest, the tenth part of which would be 49,400*l.*, say, in round numbers, 50,000*l.* a year surplus; consequently, that 50,000*l.* a year upon all the savings' banks together comprised in that return would be the sum, and nothing less, which the decision of the Court would be operating upon. But I am relieved from the anxiety that I should naturally feel if that were the case, by the consideration that the sum is of a smaller amount—a very inconsiderable sum comparatively. The decision, which I am dis-

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posed to think ought to be pronounced in this case, when it comes on on the main question, is a decision which I think, on this subject, ought to be pronounced. All I have to do at present is, to show the grounds on which I feel there is no doubt—for I ought to be clear before I order the money to be paid into Court; but I can have no doubt that this money has not been well taken care of, and that it ought to be brought into Court, where it is quite clear it will be properly applied.

The 22d section of the Act 9 Geo. 4, c. 92, provided that within six weeks after the 20th of November 1828, or as soon after as conveniently may be, where no other provisions are made by the rules of the society for the disposal of the surplus, that it should be disposed of in such manner as the trustees, or the major part of them, assembled at any general meeting, to be convened according to the rules, should think fit. The first question that arises, is upon the kind of meeting, and the mode of its convening, which came to the resolution and made the order for the appropriation of the surplus; and though I am certainly inclined to think there ought to have been a meeting convened for the purpose, with express notice, and that that was in all cases the safe construction towards which to lean, and though I think that the words here, even strictly taken, will bear that construction better than any other, “a general meeting to be convened as soon after as conveniently may be;” yet, as that is not absolutely necessary to be decided on the present occasion, if I am of opinion that how regularly soever the meeting may have been convened, it did that which it had no right to do, I certainly should not stop, because it would be going out of the way, to dispose of that first question in the

cause. For the same reason, I shall not say anything about the other point, whether the majority of the trustees who concurred in that resolution, ought to have been an absolute majority of them, or only a majority of those convened at the meeting, because, for a like reason, that point is not necessary to be decided; holding the opinion I do on the main body of the question,—the application or misapplication at the meeting, however convened, concurred in by whatever majority of the trustees, whether an absolute majority, or only of the trustees who assembled,—that that question, that main question, is to be decided against the trustees, and consequently that this decision renders the raising of the other two questions wholly unnecessary. It is to be observed, that the section requires them, or enables them to make this appropriation,—and it signifies not whether it only enables or requires,—after retaining so much as would be necessary for and towards the future purposes and management. It is said, that the words are perfectly clear, and give an absolute discretion to the trustees to do whatever they please with this fund, that is not prohibited by law, or by the rules and regulations of the society, and it is said, in answer to the question, why, according to this, they may put the money into their own pockets: no, they cannot put it into their own pockets, because they are expressly prohibited by the regulations of the society, and, indeed, the society would have no benefit of the Act if it had not such a regulation; they are expressly prohibited by those rules, and by the Act itself, from taking any beneficial interest whatever. There seems some doubt whether that regulation applies to all beneficial interest, direct or indirect, and whether it is not rather framed to strike at the prevention of their holding offices of profit,

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taking salaries, and being employed,—their being contractors, for instance, and taking any profit or emolument in that kind of way. But I need not enter into that at present, for it really does not go to affect, one way or the other, the opinion which I have formed upon the construction of the Act. It must be admitted to be a startling proposition—and yet it is one which those who maintain that the trustees were justified in that appropriation of the fund cannot recede from—that persons being appointed trustees of a savings' bank, the object of which institution is known and definite, namely, the sustentation of persons in poor circumstances by means of their savings, either when they change their mind and wish to withdraw them, or when they fall into bad circumstances and are under the necessity of obtaining them out,—that this being the only object of the institution, and the trustees having the management of that institution should have power, without any authority whatever from those who have appointed them, without any authority whatever but what may be supposed to have been conveyed to them by the Act of Parliament in question, of diverting it to totally different objects, of carrying it into a wholly different quarter, and of laying it out in a way that has no more to do with the objects of the institution than it has to do with the objects of any other, the most dissimilar institution; that they might be enabled, provided they did not do an illegal act—any act, either unlawful at common law or prohibited by some statute (including the rules and regulations of this society), they might do any one thing they chose, however wide of the objects of the institution over which they had a control, however fantastical in itself; provided they thought fit, (the words of the Act, carried to the extreme, make them the judges of what is

fit or not,) steering clear merely of the law, they might do whatever they chose with these funds, be it ever so unlike or ever so opposite to the kind of institution committed to their care; that, for instance, they might, as they have here, applied them in repairing a bridge—that of itself is almost as wide as can be well imagined of the object of a savings' bank,—they might not only have applied it to the repairing of Arundel Bridge,—I do not stop to inquire into the question, whether that is of utility for the inhabitants of the town, or for the benefit of the king's subjects, or not, because my opinion does not rest upon that,—but they might not only have repaired Arundel Bridge with it, but they might have repaired Southwark Bridge or York Bridge with it, or they might have bestowed it upon charities in the kingdom of Ireland, or might have sent it abroad to foreign parts, or might have applied it to the funds of the Bible Society, or might have applied it to the lawful expense of a contest for the election of members to serve in Parliament, for I can see no limit whatever—provided no law is broken—to the discretion which would be vested in those trustees, if the argument is to be allowed, which leaves it to them to decide, provided they decide for nothing that is not positively prohibited by law; that is a proposition sufficiently startling of itself to make one look very narrowly into the object of the Act of Parliament, and into the other provisions by which that object is sought to be accomplished.

The 23d section appears to be material in this view, although I agree that it applies not to the savings we are here dealing with, but to the new savings subsequent to the 20th November 1828. After deducting all such expenses as the trustees may deem proper, they are to pay over to the Commissioners for the Reduction of the

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National Debt the surplus, reserving such portions as may be necessary to meet the current expenses; and that surplus which they pay over, is to be carried from the account in which it stood before, into a separate account, I suppose, for the purpose of preventing its bearing interest. I do not know whether that is the object, but it is to be carried to a separate and distinct account, and applied as any other money, according to the provisions of that Act, may be applied, provided always, that it shall be lawful for the trustees to claim and receive from the Commissioners, who are hereby required to pay the same upon such certificate as they may appoint (that is to say, they are to appoint the form of the certificate), any such sum so by them received for the purposes of the institution.

Now I take it, that no doubt whatever can arise upon this; I take that to be perfectly clear, that if the question had been the construction of this section, and not of the 22d section, if, in short, the question had arisen respecting the surplus since the 20th of November 1828, there could no doubt have arisen in this way; it could only have given the trustees the power to claim, and only have called on the Commissioners to pay for the purposes of the institution, and they would have in vain attempted to have gone with the certificate—whatever the form might have been which the Commissioners might have adopted—in which certificate they would have stated the object for which they wished to have money, viz., the repairing of Arundel Bridge. Now, if so, I think we may safely consider, that this is to be taken along with the 22d section, and we may construe the one with the other, and assume that, as for the future, so for the past savings, they are to be applied for the purposes of the

institution. It may be said, that you are in a great difficulty as to what you can do with the fund. How can you apply it? Admitting, as the learned counsel must, and were forced to admit, that there appears something violent in allowing such a total diversion of the funds from any thing like the object of a savings' bank, still what are you to do with that money? The contributors of to-day are not the contributors of yesterday; the body is always changing; it is a fluctuating number of men, and the natural thing would be to give the accumulation of each man's deposit out to himself, and the surplus of each man's accumulation out to himself. But you could not; it would be almost physically impossible to trace the person in such a fluctuating body, who, under this rule, would be entitled. But that would apply just the same to the future savings as to the past, because it still will be a fluctuating body, and you still will have objects of the institution to supply; and, accordingly, the very same difficulty will arise on the construction of the 23d section, necessarily, I think, upon those words, "for the purposes of the institution," which is now alleged to arise on the construction of the 22d. But then it may be said, "Oh! the Legislature meant, if it was not drawn out for the purposes of the institution," meaning the corporate purposes, if I may so speak, in contradiction to the giving back money to the individuals,—such as making up deficits arising from accounts, paying arrears of bills, expenses of salaries, and so forth; if it cannot be applied for that, then the whole of this is meant to remain vested in the Commissioners, and the public is to have the benefit of it. It may be undoubtedly said, so I do not see any reason for excluding that supposition from the construction of the 22d section. I do not say

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that that is absolutely excluded; but this observation I must make, that I do not feel pressed by the difficulty, as if it amounted to any thing like an impossibility of applying the fund, regard being had to the fluctuating nature of the body,—applying all those arrears previous to the 20th of November 1828, also to the purposes of the institution. One can imagine various ways in which money may be kept in hand to supply future deficits, and render it less necessary to draw out for those unexpected purposes,—to render it less necessary to draw out, under the 23d section, the future arrears from that institution; at all events, it must be admitted, that this is an argument which would apply to the possibility of dealing with funds arising in such a way, and beneficially possessed by such parties—by a fluctuating body—and would be applicable not only to the cases of savings' banks, but almost to every other institution which is not constituted a corporate body.

Upon the whole, I am of opinion that the trustees had no right so to apply the money; that it was a misapplication of it; and having spent the money, part or most of it, in repairs, that they should restore it, at least subject to the jurisdiction of this Court, until the question is decided, of which I have now stated my view, which, if wrong, they will have abundant opportunities of considering and setting right in the subsequent proceedings, when the main question, to which I have principally directed my attention, comes to be raised. If what I have said does not satisfy the parties,—and I have no desire that it should not go further,—if it does not satisfy the parties it will go further, and receive subsequently a more full consideration, either here or elsewhere; and I cannot help observing, if a subject of such delicacy and interest

to the contributors to this bank is liable to any doubt whatever, with respect to the construction of this Act of Parliament, the sooner the attention of the Legislature—and it is chiefly for that purpose that I have thrown out these observations upon the construction of the Act—the sooner it is set right by a decree, or a new enactment, if necessary, so much the better, so much the more desirable, and so much the more tending to quiet any doubt that may arise in the minds of the parties.

His Lordship accordingly made an order, dated the 26th of November 1831, whereby it was ordered that the Appellant should, on or before the first day of Hilary Term then next, pay into the Bank, with the privity of the Accountant-general of the Court of Chancery, to the credit of the said cause, the said sum of 592*l.* 15*s.* 11*d.*, and that the same, when so paid in, should be laid out in the purchase of Bank Three per Cent. annuities, in the name and with the privity of the said Accountant-general. And it was ordered that the Appellant, and the Respondents Hopkins and Tompkins, should leave with their clerk in Court in the said cause, the several books, cases, letters and papers, admitted to be in their possession.

The Respondents (the plaintiffs below) having replied to the answers, and the cause being at issue, witnesses were examined on both sides; and, under admissions entered into by the solicitors, several exhibits were read at the hearing.

George Biddle, the actuary of the savings' bank deposed to this effect:—That he was appointed to that office in July 1826, and the proceedings of the trustees and managers of the bank were ever since entered in his books. Of those books in his custody,

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one contained the general proceedings; three, called ledgers, contained the accounts of the depositors; one, called a cash-book, contained accounts of the monies received from or paid to depositors. There was no entry in any of the books of the appointment of the Respondent Thomas Henty, as trustee or manager, nor of any resolution signed by him. His name, however, was found in a list of trustees in one part of the book of proceedings, and notices were from time to time sent to him of meetings of the trustees, and he was present at the meetings held on the 13th of March 1827, the 13th of December 1830, and 20th of December 1830. The practice of calling general meetings of the trustees was by sending printed notices, from five to seven days before each meeting, to all the persons whose names appeared in the list of trustees, stating the objects of such meeting. A meeting of the trustees of the savings' bank was held at the Free School, Arundel, on the 13th of November 1828; it was convened by notice under deponent's hand, dated the 8th of November 1828, "for the purpose of revising and amending certain rules and regulations, and making them conformable to the Act 9 Geo. 4, c. 92, and to transact all other such matters as the trustees by the said Act were authorized or required to do." Two other meetings of the trustees were held at the same place on the 27th of November and 11th of December 1828, and they were convened by like notices, and for like purposes. And two other meetings of the trustees were held at the same place, on the 21st of December 1829 and 13th of December 1830, convened by notices under deponent's hand; but the purposes of these meetings were not stated in the notices. And deponent further saith, that another meeting of the

trustees was held at the same place, on the 20th December 1830, and that it was convened by notice under the hand of deponent, "for the purpose of considering whether another case should be submitted to Counsel relative to the appropriation of the sum of 592*l.* 15*s.* 11*d.* which was formerly placed in the hands of trustees for the widening of Arundel Bridge; and whether the report of the committee concerning the description of persons in future to be allowed to become depositors in the said bank should be adopted." That each of the said meetings was convened by such respective notices as before-mentioned having been delivered on the days on which the said notices were dated, to such of the trustees as were then resident at or in the immediate neighbourhood of Arundel, and as to the said several other trustees by putting such notices, addressed to them respectively at their respective residences, into the post at Arundel, on the days on which the said notices were dated. And the several meetings were not committee meetings, but general meetings of the trustees of the said bank, and were convened at the Free School, being the place at which the meetings of the said bank had been constantly held for the last four years, and were so convened according to the regular course and former practice of convening meetings of the said trustees.

Charles Street deposed that he was clerk in the banking house of Hopkins & Co. of Arundel; that James Hopkins, one of that firm, was the treasurer of the Arundel Provident Bank, from November 1828. That the said banking house, in consequence of an order from the trustees of the Provident Bank, received, on the 30th of December 1828, a government debenture for the sum of 645*l.*, which was

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placed to the account of the defendants to the suit. That in pursuance of a resolution of the said Provident Bank, agreed to at a general meeting of the trustees, on the 11th of December 1828, the sum of 50 *l.*, part of the amount of the said debenture, was placed to the account of the trustees of the Arundel School; and after the transfer of 50 *l.* the sum of 595 *l.* remained to the credit of all the said defendants until the 9th of March 1831, when the sum of 592*l.* 15*s.* 11*d.*, part of the sum of 595*l.*, was transferred and placed to the separate account of the defendant W. Holmes, for the purpose of paying the expense incident to widening the public bridge over the river Arun. That W. Holmes had, since the 9th of March 1831, expended and paid for work and labour done, in widening the said bridge, the sum of 750 *l.* in the whole.

Richard Holmes, gentleman, deposed that he was present at a general meeting of the trustees of the Provident Bank, holden on the 21st of December 1829; that the said document, with the opinion and further opinion thereto, was produced and read at the said meeting. That Thomas Henty was present at the time that the said document and opinion and further opinion were so read; that the said meeting approved of, and determined to act on the said further opinion, but that it was not considered necessary to make an entry of that determination, because the resolution of the trustees at their former meeting, holden on the 11th day of December 1828, which was then referred to and read, had decided that 592*l.* 15*s.* 11*d.*, part of the surplus fund, should go for the purpose of paying the expense incident to widening of Arundel bridge, unless Counsel should be of an opinion the trustees were not authorized so to dispose of it; that

Thomas Henty objected to the said surplus being applied to the widening of Arundel Bridge, and to the best of the deponent's recollection suggested that some further opinion of Counsel should be taken; that to the best of his recollection the question was put to the vote, and rejected by all the other trustees. Deponent was present at the meeting holden on the 13th of December 1830; saith Jeremiah Lear and Thomas Henty were both present at such meeting; that Jeremiah Lear then pressed the trustees to call a further general meeting, for the purpose of taking the decision of such further general meeting as to the propriety of taking a further opinion of Counsel before the said surplus fund was finally disposed of; that he declared, that if such further general meeting was called, and the trustees should not then agree to take a further opinion, he, whatever his own opinion might be, would trouble himself no more with the matter; that the trustees present did determine to call another general meeting to decide on the question of taking a further opinion, which meeting was appointed to be held on the 20th day of the said month of December. Deponent was not present at the meeting holden the 20th of December 1830, and cannot say whether Jeremiah Lear and Thomas Henty were present at such meeting. And he further saith, that he verily believes that William Holmes, after the said meeting of the 20th day of December, acted respecting the widening of the said bridge in full confidence that the objections of Jeremiah Lear were at an end, from the declarations made by him at the said meeting of the 13th day of December 1830, until about the 1st of March 1831, on which day Mr. Blackmore, the son-in-law of Jeremiah Lear, told deponent of the intention of the complainants to file the present bill. Deponent said that the widening of Arundel Bridge is a

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very great convenience and benefit, not only to the depositors and all other persons who have business to transact at the Arundel Provident Bank, and reside on the east side of Arundel River, but to all persons travelling the main road from Lewes, Brighton, and other places lying east of Arundel River, to Chichester, Portsmouth, Southampton, Bath and Bristol, and other places lying west of Arundel River.

Among the documents which the solicitors of the parties in the cause agreed to admit, were the following:—The case for the opinion of Counsel, which stated merely that the Act 9 Geo. 4, c. 92, (to the 22d section of which, as to the appropriation of the surplus fund, particular attention was called), was therewith left; and also the rules and regulations of the savings' bank (by which no provision was made for the appropriation of the surplus); and that thereto annexed was a copy of the order of the trustees for the disposal of the surplus. The opinion was asked, whether the trustees and managers had power to make the order for the appropriation of the money?

The answer of Counsel:—"I am of opinion, that Messrs. Parsons, Holmes, Hopkins, and Tompkins cannot safely apply the 592*l.* 15*s.* 11*d.* to the purpose directed by the order of the 11th of December 1828. I think the trustees and managers had not authority to make the order for such application. The trustees and managers, or some of them, are probably liable to contribute to the expenses of the repairs and even the widening of the public bridge. At all events, the trustees and managers resident in and near Arundel would receive benefit from the proposed application, contrary to the second rule, and indeed contrary to the Act 9 Geo. 4, c. 92, s. 6, as well as to the original Act of 57 Geo. 3, c. 130, s. 3. A further difficulty occurred to me which the question

put has not made it necessary for me to consider. The present institution was of course established under the Act 57 Geo. 3, c. 130; now the first section of that Act speaks of societies established only for the benefit of the depositors. Under that Act an application of the surplus fund to a purpose wholly foreign from the objects of the society would have been questionable. That Act is repealed, and the 22d section of the Act 9 Geo. 4, c. 92, seems to give a discretionary power of application to the trustees and managers, so that they do not derive any benefit from the appropriation. It may yet deserve consideration whether the trustees should consider an application not beneficial to any of the depositors, as a fit and proper appropriation of the surplus of the depositors' fund, &c.—*W. H. Tinney*, Lincoln's Inn, October 29, 1829."

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Further Case.—“There is no foundation for the presumption that any of the trustees or managers are liable to widen the bridge. Several of the trustees and managers were and are depositors, so that the distribution of the surplus amongst either the former or present depositors would be in direct violation of the second rule; besides, as it should seem in opposition to the spirit of both the Acts of Parliament, as the former one limits the amount of interest, and the latter (because it was before too much) lessens and limits it. No English coin could be found small enough to repay the difference to any of the trustees and managers for the benefit they would derive from this money being applied to the repairs of the bridge, (but the order is ‘widen,’ and there is no intention to apply it towards repairs).

“In case you should still remain of opinion that this money cannot be applied towards widening Arun-

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del Bridge, be pleased to point out what other safe mode the trustees (in whose names it is now placed) can adopt to dispose of the money.

Further Opinion. — “ On reconsideration of the Acts, and being assured that the trustees and managers are not in any manner liable to widen the bridge in question, I think the objection and doubt I made to the proposed application of the money are not tenable. My chief reasons are, that a mere public accommodation is not, I think, a personal benefit to the trustees within the meaning of the Acts and of the rules; and that, by the Act 1 Geo. 4, c. 83, s. 13, it was expressly provided that any increase in the stock, beyond the stipulated rate of interest, should be applied and disposed of amongst the depositors, as the trustees, at a meeting, &c., should think fit and proper. The new Act, in making the power general, I think, repeals the restriction; and therefore the application need not be for the benefit of the depositors.

“ I cannot determine whether the meeting, at which the order was made, was a regular general meeting, within the 9 Geo. 4, c. 92, s. 22. The rules and regulations furnished to me contain nothing about the convening of a general meeting. I presume the meeting was regular; and am inclined to think that if it was according to the practice, and especially upon due notice, within rule 26, it would be sufficient, &c. (b). *W. H. Tinney*, Lincoln’s Inn, November 14, 1829.”

Among the numerous exhibits, the following only are material to be set forth, the other being referred to and sufficiently described in the bill and answers, or in the depositions of the witnesses.

(b) Parts of the opinions and cases are omitted, not being material.

“Arundel, 11th December 1828 —At a general meeting of the Arundel Savings’ Bank, held this day, it is resolved (after other resolutions), that the sum of 100*l.* be retained for or towards the future purposes and management of this bank. That the sum of 50*l.* be paid for arrears of rent and firing to the fund of the Arundel School. That the remaining sum of 592*l.* 15*s.* 11*d.* be paid over to the Reverend J. H. Parsons, W. Holmes, J. Hopkins and J. C. Tompkins, esquires, for the purpose of paying the expense incident to the widening of the public bridge over the river at Arundel, the same being now both narrow and dangerous, accidents having arisen thereon; and that in case Counsel be of opinion that the trustees are not so authorized to dispose of the money, that the same be disposed of in such manner as the trustees and managers present, or the major part of them at the annual meeting in the month of November 1829, shall order. That a case for the opinion of Counsel be prepared and submitted to the standing committee to be settled by them. That the treasurer do withdraw the whole of the surplus sum of 742*l.* 15*s.* 11*d.*, and do dispose of it according to the preceding resolutions.”—(Signed by Eight Trustees.)

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“Arundel, 19th October 1829. — At a meeting of the committee of the trustees of the Arundel Savings’ Bank, present, Reverend H. J. Parsons, Reverend M. A. Tierney, W. Holmes, J. C. Tompkins, James Hopkins, Samuel Evershed, a case was presented and approved of at this meeting, respecting the 592*l.* 15*s.* 11*d.* mentioned in the orders made at the meeting on the 11th December last, and it was thereupon ordered that the same should be laid before either Mr. Bell or Mr. Tinney, so as to obtain an opinion thereon, to be produced at the next annual

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meeting in December.”—(Signed by the said Six Persons.)

“Arundel, 13th December 1830.—At a general annual meeting of the trustees of the Arundel Savings’ Bank, held this day, the annual statement of the accounts of the institution was examined and approved. Resolved, that a general meeting be called on Monday, the 20th instant, for the purpose of considering whether another case shall be submitted to Counsel, relative to the appropriation of the sum of 592*l.* 15*s.* 11*d.* which was placed in the hands of the Reverend H. J. Parsons, W. Holmes, James Hopkins, and J. C. Tompkins, for the widening of Arundel Bridge.”

“Arundel, 20th December 1830.—At a general meeting of the trustees of Arundel Savings’ Bank, held this day, it was resolved, that no further case should be submitted to Counsel relative to the appropriation of the sum 592*l.* 15*s.* 11*d.*, which is placed in the hands of trustees for widening Arundel Bridge.”

The cause came to be heard before the Vice-Chancellor, on the 27th of February 1833, when his Honor, by his decree of that date, was pleased to declare that the application of any part of the surplus trust fund belonging to the Arundel Provident Bank, for the purpose of widening the public bridge over the Arun at Arundel, was a misapplication of the said fund, and that the 696*l.* 7*s.* 7*d.* Bank Three per Cent. Annuities, standing in the name of the Accountant-general in trust in the cause, and the sum of 20*l.* 17*s.* 10*d.* cash in the Bank, placed to the credit of the cause, being cash arising from the dividends of the said stock since the purchase thereof, belonged to the said Arundel Savings’ Bank, and it was ordered that the said 696*l.* 7*s.* 7*d.* Bank Three per Cent. An-

nunities and the sum of 20*l.* 17*s.* 10*d.* cash, should be transferred and paid to the Respondent James Hopkins, the treasurer of the said Arundel Provident Bank; and it was ordered that it should be referred to the Master to tax the complainants their costs of the suit up to that time, and that the Appellant and the Respondents Hopkins, Tompkins, and Parsons, should pay to the said complainants what should be taxed for such costs, and the Court did not think fit to make any order as to the sum of 50*l.* in the pleadings mentioned.

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The *Vice-Chancellor*, in making the above decree, gave this judgment (c):—It appears to me very plain that what has been done cannot be supported. The Act 9 Geo. 4, c. 92, by the 22d section, directed that, within six weeks after the 20th of November 1828, the trustees and managers of the different savings' banks shall ascertain the amount of their increased funds up to the 20th of November 1828, and shall, as soon afterwards as conveniently can be, after retaining so much thereof as may be necessary towards the future management of the bank, appropriate the same in the manner prescribed by their rules; or, if no provision be made by the rules, then in such manner as the trustees or managers, or the major part of them assembled at any general meeting, to be convened according to the respective rules and regulations of such savings' banks, shall think fit and proper. The first question is, what is to be inferred from the provisions of this Act, as to the destination of the fund in the event of the rules of the savings' banks not prescribing

(c) This judgment and that of Lord Chancellor Brougham, p. 115 *supra*, making the order of the 26th of November 1831, are taken from copies of the short-hand writer's notes, which were used and often referred to during the argument at the bar, and admitted to be correct.

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at all how the surplus should be applied? In order to construe that section, it appears to me to be necessary to consider several other clauses contained in this Act of Parliament. The 23d section directs that the surplus which should accrue after the 20th of November 1828 should be paid to the Commissioners for Reduction of the National Debt, and also directs that it shall be lawful for the trustees or managers to require and receive from the Commissioners, for the purpose of the institution, any sum of money equal to the whole or any part of the principal monies which may have been discharged from the account of the savings' banks. By the 46th section it is directed, that for the more effectually ascertaining from time to time the actual and progressive state of the several savings' banks, the trustees shall annually cause a general statement of the funds to be prepared up to the 20th of November in each year, showing the balance or principal sum due to all the depositors collectively in such savings' banks, and a statement of the expense incurred, and stating in whose hands such balance shall then be remaining. The 47th section directs, that the trustees shall cause a duplicate of such annual statement, with a list of the trustees and managers of such institutions, to be publicly exhibited in some conspicuous part of the office where the deposits of such savings' banks are usually received, for the information of all persons making deposits therein. The 48th section directs, that the Commissioners shall lay accounts annually before Parliament of the gross amount of all sums received and credited, including interest, and of all sums paid, including interest, from a given day to a given day; and the 59th section directs, amongst other things, that all accounts and returns shall be made in such form and manner, and

containing such particulars, and under such regulations, as shall from time to time be directed by the Commissioners for the Reduction of the National Debt.

It appears to me that what the Legislature had in view was the benefit of the parties who were the depositors in the banks; because that is so much kept in view, that by the 23d section, though the surplus might have been paid over, it would be repaid by the Commissioners to the trustees of any bank if it were wanted for the purpose of the institution, and the account which is directed would necessarily include (at least the first account) the statement of what was that surplus sum which the trustees might have in their hands upon the 20th of November 1828, by reason of the accumulation, ultra the interest, which, according to the preceding Act, the 5th Geo. 4, was payable to the depositors. If the account must necessarily have included it, and it appears from the very books of the society that the first account which was made up, the account of the 20th of November 1829, did contain an item which expressed that there was appropriated, agreeably to the 9th Geo. 4, c. 92, a certain sum, including the sum in question; that this form was according to that which the Commissioners had directed, it is reasonable to infer, from the circumstance that you have a correspondence between the trustees and the secretary to the National Debt-office with respect to that very entry which is contained in the first account. When it is directed that all accounts (of course including the first account) should show the balance or principal sum to the depositors, and a statement of the expense incurred, it certainly strikes me that Parliament concluded that the account would contain what was due to the depositors, and a statement of the expense, and nothing else. It

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is assumed no account will contain anything except that which does represent what is due to the depositors, and what has been the expense, and there is no other item whatever noticed as a thing which is to be contained in the account. That therefore leads me to suppose that Parliament necessarily inferred that a sum of money which was to be divisible, would, in some manner or other, be appropriated for the benefit of the depositors. Now, in order that everybody who was concerned might know what was taking place with respect to the account, the provision in the 47th section is introduced, which directs a copy of the accounts to be publicly fixed in some conspicuous part of the place where the deposits of such savings' banks are usually received "for the information" of whom? "Of all persons making deposits therein." I must suppose therefore that the account was directed to be exhibited, in order that all the parties should know how these funds were applied; and the only parties who are stated as persons likely to be interested, are the persons making deposits in the bank. I must suppose, also, that Parliament did, by this section, show their view of the case, that the persons who would be interested in the accounts would only be the persons who were depositors, and not strangers. Then I find, when this account was communicated, there is a correspondence between the trustees and Mr. Hyam, in which Mr. Hyam requests to be informed whether the sum of 642*l.* 15*s.* 11*d.* was actually paid to the depositors in money, or whether it was merely placed to their credit. That question evidently shows what the Commissioners, or at least their secretary, apprehended to be the meaning of the Act; and it is observable that the answer which is given does not state exactly what was the intention of the trustees with

regard to this money, but it merely answers the question in terms and not in substance, for it answers the question by stating that the sum of 642*l.* 15*s.* 11*d.* was neither paid to the depositors in money or placed to their credit; but it does not state how it was applied. That answer never could have furnished the information. When Mr. Hyam, in a second letter, asked that the Commissioners might be furnished with a copy of the warrant under which the sum of 642*l.* 15*s.* 11*d.* was appropriated, the committee directed that the answer to be given should be, that it was appropriated under the Act of 4 Geo. 4, c. 92, s. 22, referring only to the section; but the answer does not state what was the specific purpose to which the meeting of December 1828 had directed the money to be appropriated. This, therefore, leads me to infer that the Legislature did contemplate nothing but an appropriation, which, in some manner or other, should be for the benefit of the general depositors.

I have now to consider whether, in point of fact, even admitting that it might have been otherwise applied, the ascertained surplus has been applied in a manner which the Act of Parliament authorized. It appears to me, that the Act evidently supposed that any appropriation which should be made, would be an appropriation by virtue of a resolution of the trustees at a general meeting, as soon as conveniently could be after the 20th of November 1828. Now, what was done? There was a meeting on the 11th of December 1828, in which it was resolved, that the sum of 592*l.* should be paid over to certain persons, for the purpose of paying the expenses incident to the widening a public bridge, and in case Counsel should be of opinion that the trustees are not authorized so to dispose of the money, that the same be

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disposed of in such manner as the trustees or managers present, or the major part of them, at the annual meeting of November 1829, shall order; that a case for the opinion of Counsel be prepared and submitted to the standing committee, to be settled by them. It was part of this resolution that the opinion of Counsel should be taken upon a case which should be settled by the standing committee, and in case the opinion upon the case so settled was against the application of the money to the purpose of widening the bridge, then the fund should be applied in such manner as a general meeting held in November 1829, should direct. Now, what was the fact? That on the 19th of October 1829, a case was presented and approved of by the committee; and my opinion is, that the case having once been presented and approved of, the resolution of the 11th of December 1828 was to be followed out with regard to the opinion which should be given upon that case, and the opinion that was given upon that case, was against the application of the money for the purpose of widening the bridge. What was done? The case was in effect altered by that statement which was introduced into it after Counsel had given his opinion on the 29th of October 1829, and upon that case so altered,—which altered case never was approved of by the committee, (at least there is no evidence to show that it was,)—upon that altered case,—a second case,—the same Counsel gave an opinion which sanctioned the application of the money in the manner first proposed. It appears to me, that according to the plain terms of the resolution which the trustees adopted on the 11th of December 1828, when Counsel had given his opinion on the first case,—the only case approved of by the committee,—that they had no power whatever to do any-

thing else than to call a meeting in November 1829, for the purpose of deciding how the money should be disposed of, because that was the course which the resolution of 1828 directed; but instead of that, it does not appear that there was any meeting held in November 1829, for the purpose of considering the subject at all, and my opinion therefore is that, according to the true construction of the resolution of the 11th of November 1828, nothing was resolved which would justify the trustees in parting with the fund at all.

I cannot but think, after the trustees had made a return to the Commissioners—the return dated the 20th of November 1829—whereby they represented that there had been an appropriation, which return was made for the purpose of enabling the Commissioners to make their return to Parliament, they had not the power to come to the resolution which they adopted on the 20th of December 1830. The Act of Parliament, as I understand it, contemplated that, for the purpose of letting it be known to the Commissioners, by the return of the 20th of November 1829, what the account was, the account should contain a statement of the appropriation of the fund by reason of the resolution, which the trustees might come to at the meeting to be held, as soon as conveniently could be, after the 20th of November 1828; and the truth is, if it were otherwise, the whole of the provisions of the Act would be defeated, and my opinion is, that the trustees did wrong—I do not say *morally* but *legally* wrong—and did that which the Act of Parliament never contemplated. When they allowed the return to be made to the Commissioners, they had made the appropriation at a time when it shows there was no resolution passed which could have justified that appropria-

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tion; in point of fact, there was no resolution at all which, in my mind, could in the least be considered as directing what the appropriation should be, until the resolution was made on the 20th of December 1830. It appears to me, therefore, that, upon the substance of the case, the trustees were wrong; and upon the form of the case they were wrong, because they did not comply with the plain provisions of the Act, which, in my mind, meant that, as soon as conveniently could be after the 20th of November 1828, it should be decided how the money should be applied. My opinion, therefore, is, upon that part of the case, that the trustees were wrong.

It is not necessary to make all persons who concurred in a resolution for the misapplication of trust-money, parties to the suit for replacing it, only those who actually take and misapply the money.

I think it is no objection whatever to this suit, that Mr. Henty has been made a party, because it appears to me there is sufficient evidence to justify the placing of his name on the record as one of the trustees; his name is in the book of proceedings as one of the trustees, and it does appear, in fact, that he did attend three meetings, as I understand, in the character of justice of peace. Neither does it appear to me, that the suit is defective in not having on the record any of those persons who concurred in the resolutions, either of the 11th of December 1828, or the 20th of December 1830; for the resolutions were nothing; it was the application of the money, the taking it away from the fund of the society which constituted the act of which alone the parties had a right to complain. It is in respect of that act only that the complaint is made, and the preliminary steps which regarded the resolution appear to me no more to make the parties who concurred in it necessary, than it was necessary to make those parties who issued the notice to get the trustees together at the meeting.

It appears to me, therefore, on the substance of the

case, that the plaintiffs are right, and the trustees are wrong; and although I admit this is a hard case, and there has been no corrupt dealing with the fund, and the application of it was meant *bonâ fide*, my opinion is, that those who defend the case must pay the costs of the suit.

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The Appellant appealed to the House of Lords against the order of the 26th November 1831, so far as it directed the payment of money into Court by the Appellant, and gave consequential directions; and also against the said decree of the 27th of February 1833, except as to that part thereof, by which it is declared that the Court did not think fit to make any order as to the said sum of 50 *l.*, being the sum ordered by the trustees to be paid out of the said surplus, to the fund of the National School at Arundel.

The *Appellant* having no Counsel to argue his case, was heard for himself. In his address to the House, he relied chiefly on the following reasons, which were annexed to his printed case, and signed by Mr. *Knight* and Mr. *Wray*.

1st. As to the order of the 26th November 1831:—Because that order presumed the points of law adversely to the Appellant, and prejudiced the merits which ought to have been reserved till the hearing of the cause, and there were no peculiar circumstances requiring such an order to be made before the decree.

2d. As to both the order and the decree:—Because by the construction of the Act 9 Geo. 4, c. 92, s. 22, the trustees and managers of the Arundel Savings' Bank had power to order the application of that part of the surplus which was applied by the Appellant for the purpose of widening the public bridge at Arundel, and the same was duly appropriated to that purpose under their direction.

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3rd. Because, if the application of the surplus under the 22d section of the Act 9 Geo. 4 is to be construed to mean some purpose immediately beneficial to the depositors, or to the trustees and managers, those purposes would be unlawful, and if it means any other beneficial purpose for the bank, inasmuch as all future necessary purposes were provided for, and by the Act are required to be so, the beneficial purposes contemplated must mean an application with all convenient speed to some unnecessary purposes, or else must mean some future purposes at present not necessary, in which case the whole ought to have been retained.

4th. Because, this suit is not rightly framed to raise the questions which have been decided by the decree, it being a suit on behalf of all the trustees and depositors, except the defendants, against them, as parties acting under the orders, and as the agents of the trustees and managers, the parties who complain.

5th. Because, the construction of the Act of Parliament is a doubtful question concerning the duty of trustees, and the Appellant acted under the authority of the trustees, and as their agent upon a *bond fide* construction of the Act of Parliament by the trustees, and the decree ought therefore not to have charged the Appellant personally, and in any event ought not to have been made with costs.

The *Appellant* further argued that Henty and Lear, the only trustees who objected to the application of the fund to the widening of the bridge, were themselves, and also their relations, depositors in the savings' bank, though not in the spirit or even letter of the Acts of Parliament relating to these institutions, which were intended for industrious labourers and servants; and if their proposition of distributing

the surplus among the depositors, as recommended by the opinion of the Counsel, before whom they laid a deceitful case and therefore got a wrong opinion, had been adopted, they and their relations would take a large share of the surplus, which was inconsistent both with the Act of Parliament and with the rules of the bank.

At the time Lord Chancellor Brougham made the order for the payment of the money into Court, 446 *l.* 12 *s.* of it had been then expended, and the Appellant was under engagements for the remainder of it to the tradesmen employed in widening the bridge. His own affidavit to that effect was filed against the motion for that order. In the expenditure of the money on the bridge the Appellant had not any pecuniary benefit, as the work would cost him 200 *l.* beyond the sum voted from the surplus. In this appropriation of the money he only acted on the resolution and order of the trustees and managers of the savings' bank, who were bound by the 22d section of the Act 9 Geo. 4, c. 92, to call a meeting of the trustees within the time therein prescribed, and to dispose of the surplus. The Commissioners for the Reduction of the National Debt were satisfied with this application of the surplus; it was for them, and not the trustees, to question the propriety of the appropriation.

It was, probably, the intention of the gentleman who drew the Act 9 Geo. 4, c. 92, that the surplus should go to the depositors, but the liberal mind of Parliament directed otherwise; and that supposition was made manifest by the appearance of the word "distribute" in the marginal note to the 22d section, and its omission in the body of that section wherein the word "appropriate" only is found. The appro-

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priation of the money to the widening of the bridge was sanctioned by the opinion of Mr. Tinney, who gave, as one of his reasons, that "the mere public accommodation was not a personal benefit within the meaning of the Acts and rules, and that the previous Acts, by which the depositors were more benefited, were repealed by the last Act" (9 Geo. 4, c. 92). And that learned Counsel might have added another reason; namely, that the last Act was passed principally to lessen the interest on the deposits, and other benefits, to the depositors; which was directly in opposition to the notion that they were to be benefited by the receipt of the surplus money, especially as the clause of the former Act for appropriating it among the depositors was repealed by the last Act.

It was the duty of trustees of public monies to dispose of them not for personal and temporary benefits, but for public and permanent purposes. Well would it have been for the kingdom at large if all the surplus money of the savings' banks had been disposed of for public and permanent benefits in the immediate neighbourhood of each. This appropriation of the surplus money of the Arundel Bank partook of that nature. The corporation of Arundel was not liable, neither were the inhabitants of the county of Sussex liable to *widen* the bridge. *Rex v. The Inhabitants of Devon* (d).

The *Appellant* repeated the objections that were made in the Courts below to the bill, for want of parties, and for multifariousness.

Mr. *James Russell* for the first-named Respondents, who were the plaintiffs in the cause:—All the de-

(d) 4 Barn. & C. 670.

fendants below submitted to the decree except the Appellant; it may be a question in the practice of the House, in appeals, whether it was competent for this defendant to appeal alone.

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As to the objection that all the trustees and managers of the bank were not made parties to the suit, that was easily answered. The four defendants were the acting trustees in the appropriation of this fund. They voted it away, and made themselves trustees of it for the repairs of the bridge. They were the only trustees who were guilty of a breach of trust. Henty and Jeremiah Lear were trustees, and they for themselves and all the other trustees, except the defendants, had a right to file the bill, in which they were joined by two of the depositors, for themselves and the other depositors. *Gray v. Chaplin (c)*. This was analogous to a creditor's suit.

As to the merits of the case, all the Appellant's reasoning was founded on a misapprehension of the law. No possible construction of the Act 9 Geo. 4, c. 92, could justify this appropriation of the money. That Act was not different from the 57 Geo. 3, c. 130, in any thing except the affected elegance and studied ambiguity of its phraseology. By the last-mentioned Act, and by the 1 Geo. 4, c. 83, the surplus fund was to be distributed among the depositors, and no part of it was to be applied to any other purpose, nor were the managers to have any benefit from it. These Acts, and the similar Act of the 5 Geo. 4, c. 62, applicable to savings' banks in Ireland, were consolidated by the 9 Geo. 4, c. 92, by the 22d section of which the trustees and managers were authorized to appropriate the surplus fund, not wantonly and arbi-

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trarily, but with the same discretion with which the Legislature vested them under the previous Acts. The fallacious reasoning of the Appellant was, that the trustees, being themselves depositors, would, if the fund was divided among the depositors, derive a benefit from it which was prohibited by their own rules and by the Act of Parliament. The prohibition was against the trustees and managers, but did not affect the depositors for whom they were trustees.

The resolution for appropriating the money was irregular and void, as not sanctioned by an absolute majority of the trustees. The major part of the trustees, according to the true construction of the Act, aided and explained by the former Acts, meant, not the majority of the trustees present at a meeting, but the majority of all the trustees, present and absent. At the meeting at which the money was voted away for the widening of Arundel Bridge, only eight out of thirty trustees were present, and of these eight three voted against the resolution. The opinion of Mr. Tinney, sanctioning the appropriation of the money to the repairs of the bridge, was founded on the case submitted to him, which was drawn up by the Appellant, then mayor elect of Arundel, and *ex officio* bridge-master. It was evident from the suppression of the purpose to which the surplus was resolved to be appropriated, in the correspondence between the trustees and the National Debt-office, that they were conscious they were misapplying the money.

In addition to the costs which the Vice-Chancellor ordered the defendants below to pay, the Appellant should be made to pay the further costs of this protracted litigation. The Respondents, who had only the public benefit in view, in restraining the misapplication of the trust fund, ought not to be made to

bear any costs; and, as the Appellant alone, of all the four defendants below, appealed, he alone ought to be charged with the costs of the appeal.

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The *Appellant* in reply said, he alone found it necessary to appeal, as he alone was ordered to pay the money into Court, after he had expended it in pursuance of the order of the trustees. The other defendants were not affected by that order. Any misrepresentation made to the National Debt-office ought not to be imputed to him, as he had no part in the correspondence with that office. The construction put by the Respondents on the words of the Act, "the major part of the trustees," &c., could not be correct; for it was impossible to assemble the majority of all the trustees of this bank at any one meeting, and the practice in all such cases is, that the majority of those present at a meeting is sufficient.

The *Lord Chancellor* :—My Lords, I should suggest the adjournment of this case for further consideration, if I had any doubt of the judgment which your Lordships ought to pronounce. There are some preliminary objections made on both sides. First, it is said that it was not competent for one of the defendants below to appeal without the others—such a rule as that would lead to a denial of justice. There is no such rule of practice in appeals to this House. It was also argued that the meetings of the trustees were irregular, and that the major part meant the absolute majority, and not the majority of those trustees present at a meeting. I hold that the meetings were regular, and that the majority of the trustees who were present at the meeting was a sufficient majority. It was objected by the Appellant that Henty was not a trustee, and that he had no right to file the

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bill; and also, that there was a want of parties in not bringing all the trustees before the Court. Now it appeared from the Book of proceedings, and it was admitted in the answers, that Henty was present at several meetings of the trustees; and he was summoned as such, and voted as trustee. It was therefore competent for him to file the bill; and, as to the other point, it is, in many cases, impossible to bring before the Court all the parties in any way interested in the subject of the suit. This was one of those cases in which the general rule is dispensed with.

As to the merits of this case there are two questions; that which relates to the order for payment of the money into Court is preliminary. It was argued, that that order was contrary to the practice of the Court. It does not appear so to me. I think it was the duty of the Court to pronounce that order, and the propriety of it is apparent upon the facts stated in the answer. If the Court was of opinion that it was money which the defendants had no right to retain, and that the claims of the plaintiffs upon the fund might be established, it was in the ordinary course of practice to order the payment of it into Court. It is objected that under the authority, and by a resolution of the trustees, it was paid over to the defendants for a specific purpose, and has been applied to that purpose; but this is no answer, if, in the opinion of the Court, the resolution and the application of the money were contrary to law. That opinion, however, and the order are not conclusive upon the other question, which involves the substance and merits of the case; the order for payment of the money into Court is made only for the security of the fund.

Upon the principal question, as to the application of the money, it is immaterial to the decision of the

case, whether the bridge at Arundel did or did not require widening; the question is not whether the bridge will be improved by such application, but whether the money is legally applicable to that purpose. It is to be observed, that the fund in question arose from an increase and surplus of monies deposited in the Arundel Savings' Bank, which was a fund in the hands of trustees. Before the passing of the Act 9 Geo. 4, c. 92, no question could have arisen as to the discretionary application of such a fund; under all former Acts, and on principle, the profits arising from deposits could only be applied for the benefit of the depositors, and nothing less than the authority of an Act of Parliament could warrant any other application against the will of the parties: no other persons could by possibility have any right to the fund, or could direct the application of it, except by contract between the parties and under their authority. There was no such contract as to this fund, and the trustees created by former Acts held in trust for the depositors all the monies deposited, and all profits arising from the employment of the monies. That being the state of the law and the rights of the parties when the 9 Geo. 4, c. 92, was passed, the question in this case arises, whether they are taken away, or how far altered by that Act. The accumulation in this case existed before the Act; the question is, whether the right of the individuals to that surplus, which then was theirs, is taken away, and powers given to apply it to other purposes. The scheme of the 9 Geo. 4, c. 92, as to this surplus, appears in the 22d and 23d sections; it was provided, that from that time (November 1828) the surplus of funds deposited,—to be ascertained according to the directions of the Act,—should be paid over to the Commissioners for

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the Reduction of the National Debt, who should hold it, subject to the public undertaking to pay it, or any part of it, as provided by the Act, upon the claim of the trustees. But it was thought unjust to apply such a provision to the times which preceded the Act, because, those who had before made their deposits, did so upon the faith of laws established by previous Acts of Parliament, or contracts among themselves; those who deposited afterwards were aware of the new law. —[His Lordship read the 22d section of 9 Geo. 4, c. 92, and then proceeded.]—The second rule of this society prohibits the application of any part of the fund for the benefit of the trustees, or any person having control in the management of the institution, except the actuary. If, then, they would be liable for the repairs of the bridge, or would derive a benefit from its improvement, as appears to be the fact, the application to such purpose was not according to the then existing rules of the institution, as the Act directs that it should be. It has been contended by the Appellant that the surplus upon all deposits made previous to the 9 Geo. 4, c. 92, is in the discretion of the trustees of the savings' banks to apply to any meritorious public purpose, in any part of the kingdom, where there is no express direction by existing rules as to its application; but, considering the words in the 22d section of the Act, together with the second rule of this society, it appears to me, that the discretion of the trustees could not be exercised directly or indirectly for their own benefit, which is clearly the result of their resolution in this case, and the consequent application of this fund. If your Lordships should concur with me in this view of the case, the principal question before the House is now disposed of.

But it was pressed upon the House by the Appellant, that the costs of the suit ought not to be borne by him in a case where he had applied the fund under the order of the trustees. If the Appellant had so applied it in the execution of his duty without notice of his risk, or complaint of such appropriation, it might have been a case of hardship; and, although it might have been no answer to a claim of the depositors, it might have raised a ground of question as to the costs. But the defendant, as it appears, took a bold course. Upon this point it is necessary to look at the answer: it is thereby admitted that the Appellant, at a meeting of the trustees, proposed the application of the surplus to the purpose of widening the bridge at Arundel, and a resolution to that effect was passed; but, upon the suggestions of one of the trustees that the application might be illegal, it was agreed that a case should be stated, and an opinion of Counsel taken upon the subject. This was accordingly done, and the opinion was adverse to the legality of the application; but the Appellant, thinking the opinion wrong, stated an amended case, and obtained a favourable opinion on it. The first opinion given by Counsel was certainly entitled to great consideration, and ought to have put the parties on their guard; it was a very decisive opinion, without qualification, that the proposed application was illegal. The opinion also distinctly points out the ground of objection; viz., that the trustees were probably liable to contribute to the repairs, and even the widening of the bridge in and near Arundel, and would receive benefit from the proposed application, contrary to the second rule, and indeed contrary to the Act 9 Geo. 4, c. 92, and to the previous Act 57 Geo. 3, c. 130. The opinion also points out, that the society having been

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established under the latter Act, an application wholly foreign from the objects of the society would have been questionable, as the Act contemplates societies established only for the benefit of the depositors; and although repealed, and a discretionary power of application given to the trustees,—so that they do not derive benefit from the appropriation,—yet that the trustees ought to consider whether an application not beneficial to any of the depositors was a proper appropriation of the surplus of the depositors' fund. The case for Counsel was then amended, by stating that the trustees were not liable to widen the bridge, and that the trustees being depositors, a distribution of the surplus among them would be in direct violation of the second rule, as they would derive benefit from it; but this was a mistake, the benefit to be guarded against relates to them, not as depositors, but as trustees. The amended case goes on to state, that no English coin could be found small enough to repay the difference to any of the trustees for the benefit they would derive from the proposed application, and that the application of the fund to the discharge of the National Debt would be also for the benefit of the trustees. But the question does not turn on the benefit or amount of benefit which is to be derived from the employment of the money.

It seems that the Appellant, who had a duty to perform as trustee, was, at the time in question, Mayor of Arundel, and had an apparent interest in the improvement of the bridge. In the joint answer this passage occurs: "That this defendant, W. Holmes, was in October 1830 elected Mayor of Arundel, and that the Mayor of Arundel for the time being is bridge-warden, and always has the superintendence and management of the said bridge, and repairs said

bridge from two sums of money, one of 2*l.* per annum, payable by the owner of a certain house in the High-street; and the other of 3*s.*, payable annually by the owner of another house, situate near the bridge; and if these sums are not sufficient, then the deficiencies for the repairs of said bridge have been for many years past paid by the overseers of the parish of Arundel, either to the bridge-warden, or to the persons to whom the bills may be owing for the repair thereof." Then they (the defendants) admit by their joint answer, that "they are either occupiers or owners of property in the parish of Arundel, as well as in the rape of Arundel, and out of said parish of Arundel, and in other parts of the county of Sussex; (that is to say) defendant W. Holmes owns property of the annual value of 250*l.*, and occupies property of the annual value of 50*l.* in said parish of Arundel; and owns property of the annual value of 500*l.* in said rape of Arundel, not being in said parish of Arundel; and occupies property of the annual value of 100*l.* in said rape of Arundel, not being in said parish of Arundel; and owns property in the county (including the rape and parish of Arundel) of the annual value of 752*l.* 10*s.*" The answer then sets forth the interest of the other defendants.—The Appellant being, therefore, an owner of property, and liable to be rated for the repairs of the bridge, it may be assumed that he felt some interest, and naturally a disposition to apply, to a beneficial purpose, money which seemed to belong to nobody; and, upon obtaining the second opinion of Counsel, the resolution for the appropriation of the fund to the improvement of the bridge was adhered to. The second opinion, retracting the objection stated in the first, proceeded upon the assurance and assumption

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that the trustees were not liable to the expense of widening the bridge; that the mere public accommodation, by widening it, was not a personal benefit to the trustees within the meaning of the Acts and rules; and that the Act 1 Geo. 4, c. 83, which required an appropriation for the benefit of the depositors, being repealed by the new Act, which made the power general, the application need not be for the benefit of the depositors. On these grounds Counsel's doubt was removed and his opinion changed. But, at all events, two opinions were before the trustees, opposite to each other; and, in such a case, no prudent man would have acted as a trustee, especially when the Counsel, giving the opinions, considered the question as one of doubt and difficulty. Besides this, the opinion of another Counsel having been taken by the Respondents, which agreed with the first opinion of the Counsel consulted by the Appellant, and being, like that, adverse to the legality of the appropriation, was produced by the Respondents at a general meeting of the trustees, and a protest was made by them against the application of the fund to the widening of the bridge; but the Appellant said the defendants had got the money and the Respondents might recover it as they could. Notwithstanding these difficulties the Appellant, and those who acted with him, did not think fit to take any further opinion; they adhered to, and confirmed their former determination, resolving to proceed in the dark. They were informed that the new opinion was adverse to their proceeding, yet they determined to take no other advice; though, at that time, they were fully aware of the doubts and difficulties upon the question.

The bill was filed on the 1st of March, and on the 9th of March the money, being then in the hands of

the trustees, was applied to and expended in the improvement of the bridge. It is possible they might have acted upon good motives and from a desire to effect a public benefit, but they cannot say they did it in ignorance of what might be the consequence. Costs are not given in courts of justice by way of punishment, nor are they intended as any moral degradation; the question for the Court is, generally, which party shall pay. The plaintiffs have obtained the judgment of the Court of Chancery, and have shown that the Appellant acted upon an erroneous view of the law, knowing his conduct to be at least of a doubtful character. Ought the plaintiffs (the Respondents) to pay for this? If the Appellant does not, they must. In my opinion, justice would not be done if the Respondents were not indemnified, and this principle applies equally, if not more forcibly to the appeal, because the doubts and remonstrances of the Respondents have been confirmed and sustained by the judgments of the Vice-Chancellor and of the Lord Chancellor. I therefore move your Lordships to affirm the order and decree appealed from, and to affirm them with costs.

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It was *ordered*, accordingly, that the appeal be and is hereby dismissed this House, and that the said order and decree, so far as therein complained of, be and the same are hereby affirmed, with costs, to be paid by the Appellant, &c.—68 Journals, 167.

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A P P E A L

2 May.
19 August.

FROM THE COURT OF CHANCERY IN IRELAND.

SIR GERARD NOEL NOEL, Baronet - *Appellant.*GUSTAVUS ROCHFORD, RICHARD ROCH- } *Respondents.*
FORT, and others - - - - - }*Sterling
money of
Great Britain.
Foreign Secu-
rities.*

G. R. became a partner in a mercantile house in Ireland, in the year 1801, and having no ready money to bring into the firm, and being in London, he obtained from N. & Co., London bankers, a credit for 10,000 *l.*, by giving them his bonds, with warrants of attorney to confess judgments to secure the payment of the loan. Four bonds, drawn on Irish stamps by the London bankers' law agent in Ireland, were executed there by G. R., who resided in Ireland, and had large estates there, and none elsewhere. Each of the bonds was expressed to be for the sum of 5,000 *l.*, conditioned for the payment of 2,500 *l.* "*sterling, good and lawful money of Great Britain, with legal interest.*" The last of them was payable in March 1804. The warrant of attorney to each bond was expressed to be to confess a judgment upon a bond for 5,000 *l.* "*sterling, good and lawful money of Great Britain, with legal interest of like lawful money of Great Britain.*" The judgments were entered up in the Court of King's Bench, in Dublin, in the usual form, and had the word "*sterling*" only. The 10,000 *l.* put to G. R.'s credit, in the London bank, was applied in paying, in London, by G. R.'s direction, bills drawn by his partners in Ireland. Payments on account were made by G. R. and his agents to N. & Co.'s law agent in Dublin, in Irish currency, and he acknowledged these payments. The assignee of the securities, several years after, filed a bill in Ireland, against G. R.'s heir-at-law and executor, claiming full principal and interest; and thereupon a question was raised, whether the debt was to be repaid in English or Irish currency, and with English or Irish interest.

HELD by the House of Lords (reversing so far the decree of the Lord Chancellor of Ireland), that the sums secured by the bonds should be treated as principal money of English currency, bearing English interest, payable in London, with exchanges on the payments made by G. R. on foot of the bonds at the rate of the day on which such payments were made.

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The Irish firm in which G. R. was partner, became insolvent in 1804, owing N. & Co. upwards of 120,000 *l.*, in respect of transactions, some of which were prior in date to G. R.'s partnership. In the accounts of these debts produced by N. & Co., the 10,000 *l.* secured by the bonds of G. R. were charged against the firm. A composition was entered into for 42,000 *l.*, whereof 10,000 *l.* were to be paid by G. R., who gave a mortgage on his estate to secure the same. The remaining 32,000 *l.* were otherwise secured, and thereupon N. & Co. executed a release to the firm, releasing them and *every or any of them* from all claims or demands by N. & Co.

*Release,
 extent of.*

HELD by the Lords (reversing on a former appeal a decree of the Lord Chancellor of Ireland), that the said mortgage was not a substitution for the securities by the bonds, &c., and that the release did not, in equity, extend to the balance due on the bonds; (*see p. 167, infra*).

IN and previous to the year 1801, Sir John Hadley D'Oyley, Bart., John Sperling and Edmond Grange, carrying on the brewery and distillery business in Dublin, under the style and firm of Edmond Grange & Co., had, in the course of their business up to that period, considerable dealings with a banking-house in London, called the Middlesex Bank, the partners of which, at the time, were the Appellant Sir Gerard Noel Noel, Bart., George Templar, Henry Cutler, John Wedgewood, Nathaniel Middleton and Richard Johnson.

In 1801, Gustavus Rochfort, of Rochfort, in the

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county of Westmeath, Esq., the father of the above-named Respondents, entered into an agreement with the firm of Grange & Co., to become a partner therein, and to advance the sum of 10,000 *l.* as his share of the capital, but not being prepared to make an immediate payment thereof, he applied to the Appellant's firm of Noel & Co., and requested them to lend him that sum, which they agreed to do upon the security hereinafter mentioned. Mr. Rochfort accordingly executed to Mr. Richard Johnson, the acting partner in the Middlesex Bank, in trust, for himself and his said co-partners, four several bonds, each for the principal sum of 2,500 *l.*, dated respectively the 3d of August 1801, with warrants of attorney for confessing judgment thereon, in order to secure the payment of the said loan of 10,000 *l.* by four instalments, payable on the 29th of September 1802, the 25th of March 1803, the 29th of September following, and the 25th of March 1804, and Johnson caused four several judgments to be duly entered up on the said bonds in the Court of King's Bench in Ireland.

The bonds were drawn on Irish stamps, and executed in Dublin, and were in this form :—

“ Know all men by these presents, that I, Gustavus Rochfort, of Rochfort, in the county of Westmeath, Esq., am held and firmly bound unto Richard Johnson, of Stratford-place, in the city of London, in the sum of 5,000 *l. sterling, good and lawful money of Great Britain*, to be paid to the said Richard Johnson, or his lawful attorney, executors, administrators, or assigns, to the which payment well and truly to be made, I do bind me and my heirs, executors and administrators, and every of them firmly by these presents, sealed with my seal, and dated the 3d day of August, in the year of our Lord 1801.

“The condition of the above obligation is such, that if the above-bound Gustavus Rochfort, his heirs, &c., do well and truly pay, or cause to be paid unto the above-named Richard Johnson, his executors, &c., the just and full sum of 2,500*l. sterling, of good and lawful money of Great Britain*, on the 29th day of September 1802, with legal interest, without fraud or further delay, that then the above obligation to be void and of none effect, or else to stand and remain in full force and virtue in law.—*Gustavus Rochfort.*”

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The form of the warrants of attorney was—“To W. B., gentleman, attorney of his Majesty’s Court of Exchequer in Ireland, &c., or to any attorney of any other his Majesty’s Courts of Record in Ireland aforesaid, Great Britain, or elsewhere. These are to desire, authorise, and appoint you, &c., to appear for me, &c., at the suit of Richard Johnson, of Stratford-place, in the city of London, Esq., &c., and confess a judgment as of last Trinity term, or of any term or time whatsoever, after the day of the date hereof, with stay of execution until the 29th day of September 1802, &c., by acknowledging the action or otherwise, upon a declaration there to be filed against me upon a bond of 5,000*l. sterling, good and lawful money of Great Britain*, bearing equal date with these presents, conditioned for the payment of 2,500*l.*, with *legal interest of like lawful money of Great Britain*, upon the said 29th day of September 1802, &c.

Gustavus Rochfort.”

The judgments were entered up in the usual form of such judgments. They contained the word “sterling,” after the sums for which they were entered up, but did not contain the words “good and lawful money of Great Britain”(a).

(a) One pound British was, at par, equal to 1*l.* 1*s.* 8*d.* Irish,

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Upon the execution of the bonds, the sum of 10,000*l.* was carried to the credit of Mr. Rochfort, in Noel & Co.'s books of account, and he had liberty to draw for the same, and was by letter duly advised thereof, and he shortly afterwards wrote and sent a letter, dated the 22d of August 1801, acknowledging such letter of Noel & Co., and giving them authority to answer the bills of Grange & Co. to the extent of the money for which they had agreed to give him credit, and to debit his account for those sums up to the extent of 10,000*l.* Shortly after the receipt of this authority, Grange & Co. drew upon Noel & Co. five several bills of exchange, amounting altogether to the sum of 10,000*l.* British, and they were all duly accepted and paid by the house of Noel & Co., which continued to transact business as bankers and agents of the firm of Grange & Co. until January 1804, when Grange & Co. became embarrassed in their circumstances, and were indebted to the Appellant's house in respect of monies advanced for the use of the firm, in a sum of upwards of 120,000*l.* exclusive of the before-mentioned sum of 10,000*l.* For the debt so due, the Appellant and his co-partners agreed to accept a sum of 42,000*l.* as a composition, to be secured in the following manner: 10,000*l.*, part thereof, by a mortgage on certain estates, the separate property of the said Gustavus Rochfort; the further sum of 10,000*l.*, other part thereof, by a mortgage on certain estates, the separate property of John Sperling; 15,000*l.*, further part thereof, by a mortgage on the partnership premises, wherein the business was carried on; and 7,000*l.*, residue of the said 42,000*l.*, by a rent-charge of 1,000*l.* per annum, for the term of seven years;

before the Act 6 G. 4, c. 79, for the assimilation of the currency of Great Britain and Ireland.

and accordingly, Mr. Rochfort executed certain indentures of lease and release, by way of mortgage, bearing date respectively the 25th and 26th days of May 1804, for carrying such arrangement on his part into effect. And also in pursuance of an agreement in the said mortgage-deed contained, he duly perfected a bond conditioned for the payment of 10,000*l.*, bearing even date with the last-mentioned indentures, as a further security for the payment of the said 10,000*l.*, secured by the mortgage, on which bond judgment was entered up in the Court of Common Pleas in Ireland. In consideration of the composition, an indenture of release, dated 25th of May 1804, was executed by Noel & Co. to Grange & Co.

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The first instalment on the mortgage having become due on the 1st of January 1809, and the Appellant's firm having made applications for payment of the same without effect, the Appellant, with his partners, in July 1810, filed his bill of foreclosure, in the Court of Chancery in Ireland, against Mr. Rochfort, wherein the question as to the true construction of the said deed of release was raised, and it was therein charged, that the partners in the house of Grange & Co. were only thereby released from the claims of Noel & Co. upon the firm of Grange & Co., and not from their individual debts; that the partnership alone was the subject of the composition as well as of the release, and such was the intention of the parties, and as evidence thereof it was also charged in the bill that Gustavus Rochfort, after the execution of the said indenture of release, had paid several sums, amounting together to 7,146*l.* 16*s.* 5*d.*, in respect of the 10,000*l.* due from him upon the several bonds as aforesaid; and that, until the beginning of the year 1809, when he was applied to for payment of the first instalment in respect of the mortgage, he had

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never pretended that he was not liable to the full payment of the 10,000*l.* secured by the four bonds and warrants of attorney, or that he had paid the several sums amounting to 7,146*l.* 16*s.* 5*d.* in part satisfaction of the 10,000*l.* by mere mistake and error, and the bill concluded with the usual prayer on a bill for foreclosure of estates in Ireland.

Gustavus Rochfort, by his answer to that bill, stated amongst other things, that he was prevailed upon by Sir John Hadley D'Oyley, John Sperling, and those concerned for them, to consent to be introduced to the house of Noel & Co., for the purpose of making application to them for a loan of money to pay in his subscription on becoming an anonymous partner in the said house of Grange & Co., which introduction accordingly took place, and thereupon application was made for him by the said Sir J. H. D'Oyley and John Sperling, to Noel & Co., and a request was made to lend 10,000*l.* to him for the purposes aforesaid, and that thereupon Noel & Co. agreed to lend him the said 10,000*l.* upon the security of his bonds, and that he executed such bonds, and he thereby also insisted, that it appeared by certain pass-books between the house of Noel & Co. and Grange & Co., that the said sum of 10,000*l.* had, by operations between the said two houses, been paid and discharged; and he also insisted that the said indenture of release released him as well as the other partners in the firm of Grange & Co., not only from all claims of Noel & Co. upon the firm of Grange & Co., but also from all claims of Noel & Co. upon the partners individually, and that therefore he was not liable, and ought not to have paid any part of the said sum of 10,000*l.*, but he admitted that, in ignorance of the same having been paid, and in error, and in his own wrong, he paid considerable sums of money to Robert

Burrowes, the solicitor of Noel & Co. in Ireland, on account of said bonds, at the latter end of 1804 and in the early part of 1805; amongst which, he admitted, might be the sums stated by the bill to have been paid by him, and he thereby also insisted that, instead of his being indebted to the Appellant and his partners in any sum of money, he had paid in error and in his own wrong to Robert Burrowes as aforesaid, a sum of near 10,000*l.*, Irish currency, after the said bonds had been, as he alleged, discharged; and the defendant thereby also insisted that in case the mortgage debt for 10,000*l.* claimed by the bill should be established, that the several sums of money, amounting to the sum of 7,146*l.* 16*s.* 5*d.*, before-mentioned, together with all other sums mentioned to have been paid by him in error and in his own wrong, in part satisfaction of the said sum of 10,000*l.*, lent to him upon the security of such four bonds, ought to be taken in part payment of the said sum of 10,000*l.* secured by the said mortgage.

Gustavus Rochfort afterwards filed a cross bill in the foreclosure suit, which bill, after setting forth the several facts and circumstances insisted on in his answer to the original bill, stated, amongst other things, that he had paid 10,000*l.*, Irish currency, to the solicitor of the Middlesex Bank (the Appellant's firm), after the said four bonds had (as he alleged) been discharged, and the cross bill prayed, amongst other things, that the mortgage should be declared fraudulent, that a re-conveyance should be decreed to be executed to him, that the collateral securities should be cancelled, and that an account might be taken of the sums which he had paid Robert Burrowes in error and his own wrong, on the foot of the said four bonds,

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with interest from the time of such payment, and for re-payment thereof to Gustavus Rochfort.

The Appellant, with his co-partners, put in their joint and several answer to the cross bill, and, amongst other things, admitted that the said partner Richard Johnson, on behalf of his firm, did, at the same period at which applications were made to Grange & Co. for a settlement, and both before and after the account (therein mentioned) was made and delivered to them, authorize the said Robert Burrowes to apply personally to the said Gustavus Rochfort for payment of the said four bonds, and they thereby said that he, with full knowledge, as they believed, that the value given by the Appellant and his partners had never been repaid, and after repeated promises to discharge the same as soon as it should be in his power, did pay, in part liquidation of the principal and interest due on the bonds, several sums amounting to 7,146*l.* 16*s.* 5*d.* British, not to 10,000 *l.* Irish, as alleged in the bill, and they thereby claimed 3,000*l.*, with an arrear of interest as still due on the bonds, and they denied all satisfaction of the bonds beside or beyond the 7,146*l.* 16*s.* 5*d.*

On the 8th of December 1817, the said foreclosure cause, together with the cross cause, came on to be heard, and it was, by the decree then made, directed, amongst other things, that it should be referred to the Master to take an account in the first mentioned cause of the sum due to the Appellant and his co-partners for principal, interest and costs, secured by the mortgage, and that in taking such account, Gustavus Rochfort should have credit for all sums paid by him to Noel & Co. since the execution of the said mortgage-deed, and that the Master should

accordingly take an account of all such sums so paid by him.

Noel and Co. appealed to the House of Lords from that decree, and the appeal having come on to be heard in the year 1822, it was ordered that the decree should be reversed, and that the cross bill should be dismissed with costs, without prejudice to any claim which Mr. Rochfort might have on Noel & Co. at law, in respect of payments made by him towards the discharge of the four bonds as aforesaid, and without prejudice to any right that Noel & Co. might have for relief in equity, touching the release aforesaid; and it was ordered and declared, in the original cause, that Noel & Co. were entitled to have an account directed of what was due to them for principal, interest and costs on the mortgage for 10,000 *l.* with the usual directions consequent thereon, and that in taking such account, Mr. Rochfort was not entitled to credit for any sums of money paid by him to them towards the discharge of the four bonds, or any of them, without prejudice, nevertheless, to any question that might be made on behalf of Mr. Rochfort at law, or Noel & Co. in equity touching the same (*b*).

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(*b*) Lord *Redesdale* and Lord *Eldon*, (Chancellor,) upon moving the above judgment, made the following observations:—

Lord *Redesdale*:—This suit commenced in 1810. The object of the bill, filed by Sir Gerard Noel and his partners, was to foreclose a mortgage, executed by Mr. Rochfort for 10,000 *l.* in 1804. The title which they had under that mortgage, on the face of it, was perfectly clear. The question raised in the cross cause was of an extraordinary nature in one respect, because it sought not only the destruction of that mortgage, but the destruction also of another debt of a similar sum for 10,000 *l.*, which had been advanced by Noel & Co. to the mercantile house in Ireland, upon Mr. Rochfort's account. The decree that was pronounced in this cause sustained the mortgage-debt; but then it directed that all sums of money, which after the date of the mortgage had been paid by Mr. Rochfort to the Appellants, should be taken into account, and directed that it should be applied, first to discharging

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The foreclosure cause was set down in the Court of Chancery in Ireland, on the order of the House of

the interest, and then in deduction of the principal of that mortgage. It therefore sustained an allegation in the cross bill, that the mortgage of 10,000 *l.* was intended to be in discharge of every demand that could be made by Sir Gerard Noel and his partners on Mr. Rochfort: And the real question in the cause was, whether this mortgage for 10,000 *l.* was a transaction, that was coupled with the former debt; whether it was intended to be a release of all demands of the former 10,000 *l.*, as it was contended on the part of Mr. Rochfort, or whether it was not to be considered as a separate and distinct transaction. That prior debt had not been in any way discharged, as he states in his bill. The effect of the decree seems to be that the Chancellor of Ireland conceived the mortgage to be a perfectly good mortgage; but he conceived the prior debt had been discharged, and that therefore the payments which had been made subsequently to the mortgage, in discharge of the former debt, were to be ascribed to the payment of the mortgage. That is the principal question for consideration.

These transactions between these parties arose in consequence of a law in Ireland, by which persons are permitted to become what are called anonymous partners in a commercial firm (*). By the law of this country, if any person engages in any manner in a partnership trade, he is liable to all the debts of that partnership. But by a statute, passed in Ireland, persons are enabled to become partners for a certain sum of money, which is to be advanced to the trade, and such partner is not at all to interfere with the trade, but is only to receive his proportion of profit out of the trade. This Act of Parliament is guarded by clauses, to prevent fraud in such transactions, that persons pretending to be anonymous shall be really such.—[His Lordship, after stating the provisions of the Act, and the formation of the partnership between Rochfort and Grange & Co., and the transactions with Noel & Co. for the credit of 10,000 *l.*, proceeded.]—The nature of the transaction was this:—The bills were drawn by Mr. Rochfort, on the house of Noel & Co., in favour of Grange & Co.; in consequence of which, the names of Grange & Co. were on the bills as endorsers. They negotiated them, and, the bills being negotiated, of course were paid by the bank to the persons who held these bills. These bills being thus paid by Noel & Co., they considered the bonds and judgments of Mr. Rochfort a security to them for this debt; but they also considered Edmund Grange & Co., who were the persons in favour of whom these bills were drawn, as securities for the debt. The nature of the transaction between the bank and Mr. Rochfort was simply this: that in respect to this 10,000 *l.*, if Mr. Rochfort should be unable to pay this money, they had a claim to the amount of these bills against Grange & Co. That perhaps might be disputed by Grange & Co., but it is perfectly clear, as they had engaged, that

(*) 21 & 22 G. 2, c. 46, Irish Act.

Lords, for further directions, and on the 6th of December 1822, it was ordered by the Lord Chancellor,

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if it was inconvenient for him to pay this 10,000 *l.* they would themselves pay the instalments, and take an assignment of the securities. Then the question is, whether this would not be a fraud upon the statute, as the effect of it would be still to keep up these bonds and judgments as a debt against Mr Rochfort: and it is clear, that Mr. Rochfort did not advance a shilling to the partnership, unless he advanced it by means of these bonds and judgments, and therefore he was not an anonymous partner. In the year 1804 the affairs of the partnership of Grange & Co. became so embarrassed that they were unable to pay the amount of the debt due from them to the Middlesex Bank, which, according to the statement of the Middlesex Bank, amounted to a sum above 100,000 *l.* They came to a compromise with the house of Grange & Co., and agreed to accept of the sum of 42,000 *l.* in a particular way. It is perfectly clear, from all the facts and circumstances of this case, that at the time of this agreement for the composition for that which constituted the debt of Grange & Co., it was not in the contemplation of anybody that that compromise was intended to apply to anything but to the debt that was due from Grange & Co.

For the purpose of carrying this compromise into execution, a sum of 10,000 *l.* was agreed to be secured by Mr. Sperling, who was an anonymous partner, or represented himself to be such; a sum of 10,000 *l.* by Mr. Rochfort; and Sir John D'Oyley, who was another anonymous partner, and who, I apprehend, was considered as totally insolvent, was to assign all his interest in the partnership effects. Mr. Sperling and Mr. Rochfort were capable of answering this demand to a much larger amount, but insisted on the protection of the Act of Parliament, as being anonymous partners, and, therefore, not liable to the demands of the general debts of Grange & Co. In addition to the sums thus to be secured by these two gentlemen, the remainder of the 42,000 *l.* was to be secured on the partnership property, and one purpose thereby to be effected was to enable the partnership of Grange & Co. to proceed to carry on their business, and with the capital that would then belong to the partnership, to discharge the difference between the sums secured by the anonymous partners and the amount of the compromise, viz. 22,000 *l.*

With this view the mortgage in question in the original bill, filed by Sir Gerard Noel, was executed. The release, dated the 26th of May 1804, was executed by Mr. Rochfort, of the first part; Noel & Co., of the second part; and Henry Cutler and William Leake (as trustees), of the third part; and it recited, that Noel and Co. "in their late business, as bankers, had at different times advanced considerable sums of money, and also accepted several bills of exchange for the co-partnership of Grange & Co., on which accounts" (that is, an account of the bankers and this distillery company, and not any individual, and particularly not Mr. Rochfort,

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that the said order be carried into execution, and it was accordingly referred to the Master to take an

who entered into this deed,) "on which accounts a greater sum than 42,000 *l.* was then due to Noel & Co.; that a compromise of accounts had been entered into between the house of Noel & Co. and the house of Grange & Co., including Mr. Rochfort, and that it had been stipulated and agreed, that Noel & Co. should accept and take 42,000 *l.* currency, in liquidation and full discharge of all sums due and owing to them, the principal and interest from the partnership of Grange & Co., &c." So that it is clear from this deed, that the 42,000 *l.* was to be paid in discharge of the company's debt, and not for any debt of Mr. Rochfort. Upon these recitals it was stipulated that 10,000 *l.* should be secured by Mr. Rochfort by a mortgage in Ireland, to be payable in the manner and on the days and times therein mentioned, together with interest at the rate of 5 per cent. This deed was executed on the 25th and 26th of May 1804, and the bonds, originally given by Mr. Rochfort to secure 2,500 *l.* each, were payable on the 29th of September 1802, the 25th of March 1803, the 29th of September following, and the 25th of March 1804. According to the provisions of the deed, the interest on this 10,000 *l.* was to commence from the 1st of January 1804. It was not, therefore, a substitution for the debt which was finally payable on the 25th of March 1804. It could not include interest which became due from August 1801. It could not be for that debt which was secured by the original bonds and judgments entered in by Mr. Rochfort. If it had been the intention of this transaction to put an end, as against Mr. Rochfort, to the prior bonds and judgments entirely, that intention would have been noticed in this deed. Accompanying this instrument, there is another, the indenture of release, dated the 25th of May 1804. It is insisted that, from the general words contained in this instrument, Mr. Rochfort is discharged at law from this debt, which he contracted in the year 1801, and which was a separate debt.

His Lordship, after stating the parties to the release, and some of the recitals in it, proceeded to say, that it states the agreement to charge the partnership with the sum of 22,000 *l.* (15,000 *l.* by way of mortgage, and 7,000 *l.* by different payments of 1,000 *l.* a year, for seven years, out of the partnership funds) and that, in pursuance of this agreement, the house of Noel & Co. agreed to release and discharge the firm of Grange & Co. from all claims and demands whatsoever, on account of any sum now due to them, upon the balance of such accounts as aforesaid, upon having the sum of 35,000 *l.*, with interest at 5 per cent., together with the 1,000 *l.* a year, for seven years, well and effectually secured to them, &c. And then it states, that Sir Gerard Noel and his partners remit, release, exonerate, &c. the other house, and *every* of them, from every claim and demand, from all manner of action and actions, suit and suits, &c., which they might have against them or any of them, &c.

account of what was due to the Appellant, for principal and interest on foot of the mortgage in the

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From the introduction into this release of these words, "or any of them," it is contended, on the part of Mr. Rochfort, that he was actually discharged from the transaction entered into by him in 1801. Then there is a proviso, "that nothing contained in this release shall extend, or be construed to extend, in anywise howsoever, to release or discharge the said John Sperling, Gustavus Rochfort, John Butler, Edmund Grange, and Richard George Grange, or any of them, or their respective heirs, &c., from or in respect of the said sum of 35,000 *l.*, or the interest to grow due for the same, or the said yearly rentcharge of 1,000 *l.*, or from or in respect of any securities given, or agreed to be given for the same sum, and interest and rentcharge respectively."

It is contended, on the part of Mr. Rochfort, that in this transaction he has been deceived; that he had no knowledge, till a certain time, that there was a pass-book, in which these bills had been entered against Grange & Co. It is clear, that when this transaction was executed, in 1804, he had no idea but that he was debtor on the bills, and also on the bonds which he had entered into in 1801; for he begins paying money on these bonds, according to the condition of them. He is pressed by Noel & Co. on them. He never disputes his liability to pay these bonds, and he proceeds to pay the money that was due on them. Then he says, in 1805, he finds by this pass-book that this debt was actually paid. It seems to me impossible to conceive how this could be. The entry in the pass-book did not pay the bills. The entry of that sum in the pass-book was for no other purpose than to make the house of Grange & Co. liable. If Mr. Rochfort should not make his payments according to the condition of the bonds, the banking-house of Noel & Co. had a right against Grange & Co. to demand the payment of those bills; and unless they had put their names on those bills, to give additional security, the house of Noel would not have advanced this money to Mr. Rochfort. It is therefore clear to my mind, that in 1804, and for a considerable time after, it was not in the contemplation of this party, that he was not debtor on these bonds and judgments, given by him in 1801, as well as for the mortgage in 1804, for the like sum of 10,000 *l.*, that being to commence from the 1st of January 1804, and the first transaction in August 1801, and the 10,000 *l.* secured by the mortgage in 1804, being expressed to be a compromise of whatever was justly due from the partnership of Grange & Co. to the Middlesex Bank. Under these circumstances, I am at a loss to conceive on what ground it can be contended, that the banking-house of Noel & Co. are not to have the full benefit of that mortgage for 10,000 *l.*; and why they are not to have the full benefit of the bonds and judgments which they have obtained for securing the like sum of 10,000 *l.* With respect to that sum, I think there exists an instrument which creates a difficulty at law—the release executed in

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pleadings mentioned, and that the Master should take an account of all debts, charges and incumbrances

1804. There are, in that release, general words which might appear to discharge that debt. Now it is perfectly clear, taking all the circumstances together, he ought not to be discharged from that debt, because it was not the purpose of that deed to discharge it; and it is clear from the recitals in the mortgage and release, that nothing was intended but the partnership debts. Then supposing these extensive words had the operation in law to extinguish the debt of 1801, and to prevent the Middlesex Bank recovering; yet if it should have that effect, contrary to the true intention of the parties, the Middlesex Bank may have a right to have that deed reformed in equity, and to have it restricted to what ought to be its just operation; because a court of equity would not permit Mr. Rochfort to avail himself of what was not within the contemplation of any of the parties. It is clear from all the facts of this case, that it was not the intention of any of the parties to discharge any debts but those of the partnership; and it appears that Mr. Rochfort did so understand it.

Under these circumstances, it appears to me, that the decree in this case is founded in error, and ought to be reformed. The decree directs, "that the Master should take an account of the sums due to the Appellants for principal, interest, and costs, secured by the mortgage, and that in taking such account, the Respondent should have credit for all sums of money paid by him to the Appellants, or any of them, since the execution of the said mortgage-deed." That would include all the money paid on account of the bonds given in 1801. I conceive that direction to be unfounded, as giving a species of relief in the cross bill without disposing of that bill in the manner it ought to be disposed of. The cross bill should have been dismissed, as it is perfectly unfounded.

I apprehend that if the case is founded completely in error, and that the cross bill ought to be dismissed, then an account ought to be directed of what was due on the mortgage, and the payments made in respect of the mortgage debt; if any payments have been made, they should be referred to the mortgage debt, and not to the debt of 1801; and the decree ought to be reformed accordingly. This is what, as I should submit, ought to be the judgment of your Lordships on this appeal, dismissing the cross bill, and making the decree simply on the original bill, directing the Appellants to account for what money they have received.

Lord Eldon (Chancellor):—I should wish to have a little more time for farther consideration. There are, however, some points in the case which I should wish to dismiss at this moment. In the first place, it is perfectly clear, that if the principle of this decree is right, the decree itself is wrong; but I think the principle is as bad as the decree. But, admitting the principle to be right, the

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decree itself is certainly wrong. This mortgage is attempted to be represented as a security for 10,000 *l.*, for the payment of which Mr. Rochfort cannot be called upon, on two grounds. First, it is said there was a release of the debt that was due on the bonds; that at the time the mortgage was executed Mr. Rochfort had no notion that the old debt was to continue, and that he was acting agreeably to that notion. But this release was principally for the partnership debts, and did not extend to any other payments. This must be construed as a release in equity, as this is an application to a court of equity; and although it might be doubtful whether this would not be a good release at law, yet if a party has paid a debt which was due according to equity and conscience, a court of equity would never give him back one shilling of that debt. I doubt whether in a court of law he could recover it, and it is clear it was not intended to operate as a discharge of any antecedent debt, according to the equitable intention of the release. It has been contended that that debt was antecedently paid, though that is not agreeable to the fact. Besides, Mr. Rochfort never understood it as such a transaction, or that that release was intended to cover his individual debt. He has paid, since the mortgage was executed, large sums of this debt in equity. I have not the slightest doubt that Mr. Rochfort is still liable to the bond debt, and also for the debt secured by the mortgage. I do not know whether he has paid the whole of the debt on the bonds, but if he has made payments in reference to these bonds, he shall not be permitted in a court of equity to ascribe or refer them to any other debt. If he has not paid the whole of the debt on the bonds, the parties will take such steps for the recovery of the residue as they may be advised. But if this release is not conformable at law to what was the intention of the parties, it may be made so with a view to enable them to call for future payments, if anything were due on these bonds. They say, in fact and in truth, these bonds were in part paid before the mortgage was executed; and if that was so, that very statement is an argument that admits both the bond debt and the mortgage debt; and therefore, both in law and in equity, this decree is not such a decree as ought to be made in this cause.

I never heard before that an entry in a pass-book was payment. This pass-book contained many debts and credits between this distillery company and the Middlesex Bank. These bonds appear to be entered long before the time when they were finally due. This shows clearly that Mr. Rochfort's bonds, for 10,000 *l.* were, *primâ facie*, held in their hands as a collateral security for the repayment of that 10,000 *l.* Is it to be contended, that because a man's bonds have got into my pass-book, that therefore I have got the 10,000 *l.* in my pocket? As at present advised, therefore, I think there is no pretence to say that these bonds were paid prior to the execution of the mortgage.

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Charges were accordingly filed by several persons, claiming to be entitled to the benefit of this decree,

His Lordship, on a subsequent day, said, I reserved to myself the opportunity of considering the question of payment or no payment being made of the four bonds, or some of them. Since the case was last before the House, a petition has been presented to your Lordships from Mr. Rochfort, praying that an issue may be directed, to try whether this payment had been made. I believe none of your Lordships recollect an instance in which, after the counsel had been heard through at your Lordships' bar, a new view has been presented of the case, and you have been desired to hear counsel upon that new view so presented. I should be extremely unwilling in any case to establish such a precedent; but I have no difficulty in this case in declining such a course; for though the counsel never mentioned such a course at the bar, no Judge could overlook the question, whether such a matter was, under the circumstances of the case, fit to be tried in an issue or not. And if we were now to hear counsel upon that matter, the answer would be, first, that the pleadings do not suit that case; but I think further, that the fact is clear, and that if an issue were directed, it must be a misdirection of the Judge that could induce any jury to find that those bonds were paid; I mean, paid previous to the execution of this indenture of mortgage.

I mentioned the other day, that if the release, which we have heard insisted upon at the bar, were to be taken to be a release of the debt upon the bonds, it seems to me that Noel & Co. should so have framed their suit as to pray relief against that release; but if there is an equity entitling the parties to say that that release, whatever be the legal construction of its terms, shall be considered as a release, which a court of equity would not enforce, I took the liberty to say the other day, and I say now again, that if there is that, which could have been pleaded as a release at law, but which upon the face of it, looking at its recitals and the circumstances of the case, would not entitle it to be considered in a court of equity as an effectual release, if, instead of taking advantage of it at law as a release, payment had been made of those debts, which at law it might be taken to release; still, if the claims were equitable and according to good conscience in a court of equity, those payments could not be relieved against; and I need not state that, on an appeal from the Court of Chancery, we are sitting here as a court of equity; the consequence is, that this release can never be set up against those payments. If the release executed extended to this 10,000 £., the difficulty that we have here is, how is it possible that the parties could have so misunderstood the matter as to have acted in the manner in which they have acted; the prayer of the cross bill is so framed that they seem to have forgotten entirely that, supposing they could make nothing of the release at law, yet if a man has paid money by mistake as due under a bond, that was not due under a bond, he has nothing to

as judgment creditors of the said G. Rochfort, prior to the date of the said mortgage.

Mr. Rochfort died in January 1824, and before any further proceedings were had, leaving the first named Respondent, his eldest son and heir-at-law, and the second named Respondent, executor of his will.

The mortgage and mortgaged premises, and the said bond and warrant of attorney, and also the said four bonds and judgments, having, after several mesne assignments, become ultimately vested in the Appellant, he, on the 1st of July 1824, filed his bill in the Court of Chancery in Ireland, in the nature of an original and supplemental bill, against the said Respondents and the incumbrancers on the deceased's estates, stating, amongst other things, the facts and proceedings hereinbefore mentioned; and also stating the death of the said Gustavus Rochfort, and that he

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do but to bring an action and to recover back the money so paid. In this case, though I am clearly of opinion, on looking into these proceedings with great accuracy more than one day since your Lordships were employed in considering the case, that it was impossible upon this evidence to contend that the bonds were paid; yet it does appear to me, that though you ought not to grant an issue, you ought so to frame your judgment, that if it can be made out to have been paid under mistake, and that payment has not been so long ago that the Statute of Limitations will be an answer to any action which may be brought, we ought to save that point; and therefore, I am of opinion, that the right judgment in this case will be to dismiss the cross bill, which seeks to affect the mortgage as a fraudulent mortgage, and to have the bonds delivered up, on the ground that the payment on the mortgage-deed ought to be set off against the bonds, and that the bonds must be taken to have been paid: it seems to me that the proper judgment will be to direct the Court of Chancery to take the usual accounts of what is due under the mortgage, and if Mr. Rochfort should seek to avail himself of the release, as a ground on which he would have relief at law, to give the other party an opportunity of availing himself in equity of any proceeding which might enable him to get rid of the release. I should propose, therefore, to reverse the decree complained of, and order that the cross bill be dismissed with costs. —[His Lordship stated the terms of the order as above, p. 167.]

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had by his last will charged his estates in Ireland with payment of his debts; and it prayed, amongst other things, an account of the real and personal estate of the deceased, and of his debts and legacies, and that all persons having incumbrances might come in and prove the same; that the priority of the said debts might be ascertained, and that an account might be taken of the said judgments, and the interest and costs, and that the Appellant might be paid the same, and that if the personal estate of the said Gustavus Rochfort should be insufficient to discharge the same, then that his real estates, or a competent part thereof, should be sold, and that the Appellant and the other creditors might be paid according to their priorities.

The Respondents Gustavus Rochfort, the eldest son and heir-at-law of G. Rochfort, deceased, and Richard Rochfort, his second son and executor, put in their answers, and therein stated, amongst other things, that about June 1801, their father, then member for the county of Westmeath, was in London, when he met Sir J. H. D'Oyley and John Sperling, his cousins, and that they entered into a scheme to draw him into the house of Grange & Co., and that they accordingly stated to him, that if he would become a partner, he would realize fifty per cent. per annum on his share, which their father, though possessed of great landed estates, declined, on the ground that he had no ready money, whereupon D'Oyley or Sperling, or one of them, undertook to introduce him to Noel & Co., who, they alleged, would advance the necessary sums for that purpose; that the Respondents had heard and believed that D'Oyley and Sperling, or one of them, introduced their father to the bank of Noel & Co., and that their then acting

partner, Richard Johnson, agreed to advance to him a sum of 10,000*l.* British, on his four bonds, with warrants of attorney for confessing judgments, payable the 29th of September 1802, and the 25th of March 1803, and the 29th of September 1803, and the 25th of March 1804; and that on the 3d of August 1801, the solicitor of the said bank prepared four bonds and warrants for 2,500*l.* each, which the Respondents' father accordingly executed, upon which the solicitor entered up four separate judgments in the Court of King's Bench, Ireland, and forwarded the certificate of the same and the bonds to the house of Noel & Co., through the house of Grange & Co.; that Respondents had been informed and believed, that the said Sir J. H. D'Oyley drew five bills of exchange at sixty-one days: the 1st dated the 11th day of August 1801, for 2,473*l.* 12*s.*; the second, 14th of August, for 1,100*l.*; the third, on the 17th of August, for 2,000*l.*; the fourth, on the 10th of September, for 2,000*l.*; the fifth, on the 17th of September, for 2,426*l.* 8*s.*, making together the sum of 10,000*l.* on the said house of Noel & Co.; that Respondents could not set forth what applications were made to their father by Noel & Co. for payment of the four bonds, but they believed that he, at the several times in the bill for that purpose mentioned, made the several payments mentioned, as well as some other, in respect to the four bonds, in error and in his own wrong, not knowing the contents of the said deed of release, or of certain entries in the said pass-books.

The answer also stated, that the Respondents believed that the mortgaged lands would be adequate, after paying liens and judgments affecting the same prior to the said mortgage, to pay the sum fairly due on such mortgage; for as they were informed and

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believed, the said sums so paid by their father to Noel & Co., in error, and in his own wrong, amounting to upwards of 8,000 *l.* Irish, in discharge of the debt, which they alleged had been previously paid and discharged, ought in equity to be set off in payment and satisfaction of so much mortgage debt.

The other Respondents having put in their answers, and the Appellant having filed replications, issue was joined, and witnesses were examined on both sides. The cause came on to be heard in 1828, before Sir Anthony Hart, then Lord Chancellor of Ireland, who by an order dated the 19th of June of that year, directed two issues to be tried by a special jury; first, to try and inquire whether the sum secured by the four bonds, bearing date the 3d of August 1801, executed by G. Rochfort to R. Johnson, for securing the principal sum of 2,500*l.* each, had been paid or satisfied; and in case the jury should find that such bonds had not been paid or satisfied, then and in such case, that one other issue be directed, to try and inquire whether the indenture bearing date the 25th of May 1804, was in law a release of the sums secured on the said four bonds.

From that decretal order the Appellant appealed to this House. The appeal was heard in the Session of 1831, when the order complained of was affirmed, with variations of the issues to this effect: that all the words after the first word "satisfied" be left out of the first issue; and that all the words after the word "whether" to the word "bonds," be left out of the second issue, and the following words substituted, "by any other deeds executed or payments made, or in any other way the sums secured on the said bonds have been paid, or the debts created by the said bonds released, or otherwise satisfied." The cause

being remitted to the Court of Chancery in Ireland, the issues, as amended, were tried in the Court of King's Bench in Ireland, in November 1831, when a verdict was found for the Appellant (who was the defendant in the feigned action) on both issues.

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The cause came on for further hearing on the judge's certificate, in December 1831, before Lord Plunkett, then Lord Chancellor of Ireland, who by a decree dated the 21st of that month, declared the will of Gustavus Rochfort, dated in 1820, to be well proved, and ordered the trusts thereof to be carried into execution ; and that it be referred to the Master to take an account of the sum due to the Appellant on foot of the four judgments obtained on the bonds by Richard Johnson in 1801, for principal, interest, and costs ; and to take an account of the real and personal estate of G. Rochfort at the time of his death, by whom the same had been received, and how applied ; and an account of his debts, legacies, &c., and of all incumbrances affecting his real and personal estate.

Witnesses were examined on interrogatories before the Master, on behalf of the Appellant.

W. Dallas, who was clerk in the bank of Noel & Co. in 1802, deposed, that the sum of 10,000*l.*, secured by G. Rochfort's four bonds, was advanced to him, or for his use, or by his direction, by Noel & Co., in British currency.

Robert Burrowes, the law agent of Noel & Co. in Dublin in 1803, and up to 1806, deposed, that he was employed to obtain payment of the amount of the four judgments in 1803, and he received payment of several sums from G. Rochfort or persons acting for him, in respect of the said judgments ; and in Fe-

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bruary 1804, he received in respect of them 1,000*l.*, Irish currency, and he lodged the same in a banking-house in Dublin, to the account of Noel & Co.; and he received altogether, in different payments, including the said 1,000*l.*, on account of the said judgments, 8,890*l.*, Irish currency; viz., 4,000*l.* in September 1804, 2,500*l.* in December following, 860*l.* some time the same year, and 530*l.* in July 1805. And he remitted the said 4,000*l.* the day after he received it, by a bill for 3,539*l.* 16*s.* 3*d.* British, enclosed to Noel & Co., which, at the then course of exchange (13 per cent.) was equal to the said 4,000*l.* Irish; and he remitted in like manner, in December 1804, Bank of England notes to the amount of 2,250*l.* British, which, at the then course of exchange (10 per cent.) was equal to 2,475*l.* Irish; and in August 1805, he remitted a bill of exchange for 500*l.* British, which, at the then course of exchange (12½ per cent.) was equal to 562*l.* 10*s.* 6*d.* Irish currency; and he also remitted in August 1805, 500*l.* British, which, at 12½ per cent., the then course of exchange, was equal to 562*l.* 10*s.* Irish.

The Master made his report, dated the 31st of May 1831, and thereby, among other things, certified that G. Rochfort executed the said four bonds in Ireland to R. Johnson, in trust, as already mentioned, each in the sum of 5,000*l.* sterling, lawful money of Great Britain, conditioned for the payment of 2,500*l.*, of like lawful money; and that the said R. Johnson, as of Trinity Term 1801, obtained judgments on the said bonds in the Court of King's Bench in Ireland; and that the sum of 10,000*l.*, secured by the said bonds, was advanced by the house of Noel & Co. to the said G. Rochfort, or for his use, in British currency. The report then proceeded in these words:—"That

there was due to the Appellant 8,441*l.* 13*s.* 6*d.*, being principal and interest at five per cent. But, on the part of the defendant (the Respondent) it was contended, that, the said bonds and warrants having been executed in Ireland, and the judgments thereupon entered in the Court of King's Bench, Ireland; and also, as it appeared from an account furnished by Robert Burrowes, as attorney for said banking-house, in the year 1804, proved in this cause, that said Robert Burrowes, as such attorney and authorized agent of plaintiffs, in that account treated the sum so advanced as Irish currency, and charged interest at the rate of six per cent., I should find the sum secured as principal money, Irish currency, and report accordingly. On the part of the plaintiff (the Appellant) it was contended, that I should treat the sum advanced as British currency, and payable with British interest, at five per cent.; and after I had prepared the draft of my report, in which I treated the sum advanced as British principal and British interest, the same counsel contended that I should report that the sum advanced being British principal on Irish security, should be liable to six per cent. interest; and also that I should report that the plaintiff was entitled to the exchange on the payments made by the defendant at the rate of the day: but the defendant insisted, that under any circumstances, he was not liable to any exchange, but was entitled to make the payments in Ireland, without reference to any remittances to London; and I concurred in opinion with the defendant on this point: but, with a view to save time and expense, I have taken the account in five different ways: *first*, as British principal, at five per cent. interest; *secondly*, as Irish principal and Irish interest;

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thirdly, as British principal and English interest, with exchange on the payment made by defendant as at the rate of the day; *fourthly*, as British principal and Irish interest, as on securities executed in Ireland; and *lastly*, as British principal and Irish interest, with exchange on payments made by defendant at the rate of the day; and I submit to your Lordship which of those several modes of taking the account should be adopted. If your Lordship shall be of opinion that the first mode of taking the account should be adopted, then I find that there is due and owing to the plaintiff, on foot of said four judgments, for principal, interest, and costs, the sum of 8,441 *l.* 13 *s.* 6 *d.*, to the 12th day of April 1833; if the second mode ought to be adopted, then I find there is due and owing to the plaintiff, on foot of said four judgments, for principal, interest, and costs, the sum of 7,835 *l.* 10 *s.* 11 *d.*, to the 12th day of April 1833; if the third mode, then I find there is due and owing to plaintiff, on foot of said four judgments, for principal, interest, and costs, the sum of 9,197 *l.* 16 *s.* 2 *d.*, to the 12th day of April 1833; if the fourth mode, then I find that there is due and owing unto plaintiff, on foot of said four judgments, for principal, interest, and costs, the sum of 10,390 *l.* 1 *s.* 2 *d.*, to the 12th day of April 1833; and if the fifth mode, then I find there is due and owing to plaintiff, on foot of said four judgments, for principal, interest, and costs, the sum of 11,241 *l.* 19 *s.* 8 *d.*, to the 12th day of April 1833, as by the second schedule to this my report annexed, and to which I beg leave to refer, will appear."

The Appellant excepted to the report, for that the Master therein stated that Burrowes was the authorized agent of the Appellant, and as such, in the

account between the Appellant and his partners with G. Rochfort, deceased, treated the sum of 10,000*l.*, advanced by the said banking-house, as advanced in Irish currency: whereas he alleged that the said Burrowes was merely the attorney-at-law of the said banking firm, and was not authorized as their agent, otherwise than as such attorney, to recover the amount of the said four judgments, and had no power, by any act as such attorney, to change the nature and character of the transactions between the parties, and because no evidence of his being such authorized agent was laid before the said Master to justify such finding.

The Respondent, G. Rochfort, also took exceptions to the report, for that it was stated thereby that the sum of 10,000 *l.* British was secured by the said bonds, warrants, and judgments: whereas he alleged that the Master should have stated that the sum so secured was the sum of 10,000 *l.* Irish; *secondly*, for that the report stated that the Respondent contended only upon one ground that the sum secured by the said securities should be considered as Irish currency, whereas he contended, upon various grounds and reasons, that the currency should be considered as Irish and not British currency: *thirdly*, for that the Master, by his said report, had credited all the payments made by the late G. Rochfort to the Appellant and his co-partners (save one), in discharge of the four judgments, whereas he should have credited each payment as made in discharge of one judgment only, and so on until each judgment was paid.

The cause came on for hearing upon the exceptions, and for further directions, upon the 24th of June 1833, when the Lord Chancellor of Ireland, (Lord Plunkett,) amongst other things, decreed that the Appellant's exception should be overruled, and

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he declared that the account, as taken by the Master, treating the sums secured by the four bonds in the report mentioned as Irish currency, and bearing interest at the rate of six per cent., be adopted; and that the sum of 7,835 *l.* 10 *s.* 11 *d.*, found to be due on that account, with interest at the rate of six per cent. on the sum of 3,182 *l.* 16 *s.* 4 *d.*, being the principal sum remaining due on foot thereof, were charges on the lands and premises in the pleadings mentioned, with interest on the said principal sum from the 12th of April 1833, to which time the Master calculated interest, up to the date of the decree.

The appeal was against that decree.

Mr. *Pemberton* and Mr. *Wigram* for the Appellant:—There are three questions raised in this appeal for the consideration of your Lordships; first, the question whether the principal sum secured by the bonds was British or Irish currency; secondly, whether that principal was to pay English interest of five per cent., or six per cent., as in Ireland; and thirdly, whether the exchanges and expenses of transmitting the payments made in Dublin, in respect of the bonds, were to be charged to the lender or the debtor in Ireland. The reasons alleged in support of the decree are, that the securities were executed in Ireland, where the party granting them resided, and the judgments were entered up there in the usual form of Irish judgments; that the law agent of the house of Noel & Co., in an account furnished by him to the debtor, treated the bonds and judgments as Irish securities, and the payments made on the foot of them as Irish money, and the Appellant was bound by the acts of the agent; and that the judgments so entered up, were

in form and substance declarations on record that the sums secured by them were of Irish currency. It is difficult to understand the grounds on which the Court below decided that the Appellant was to be paid in Irish currency for a loan made in British money, after the Master reported that the loan ought to be repaid in British currency. Was the creditor to be paid in shillings, when he advanced his money in pounds? There was a sum of 10,000 *l.*, secured by bonds and judgments for 20,000 *l.*; if the judgments, which were for the penalty, were entered up for 20,000 dollars, would the amount of the original debt be thereby altered?

The original contract for an advance of 10,000 *l.* having been made and entered into by the parties to it in London (a fact admitted by the Respondent), it must be presumed that an advance in English sterling money, and not in Irish currency, was intended by both parties. The operative parts of each of the four bonds executed by Mr. Rochfort as a security for such advance, express him to be bound "to Richard Johnson, esquire, of Stratford-place, in the city of London, in the sum of 5,000 *l.* sterling, good and lawful money of Great Britain;" and the respective warrants of attorney to confess judgments, accompanying the bonds, authorize any attorney of the Court of Exchequer, or of any other of His Majesty's Courts of Record "in Ireland, Great Britain, or elsewhere," at the suit of Richard Johnson, of Stratford-place, London, to confess judgment in such Court of Exchequer, and also in any other of His Majesty's Courts of Record, "in Ireland, Great Britain, or elsewhere," by acknowledging the action upon a declaration to be filed upon a bond of 5,000 *l.* sterling, "good and lawful money of Great Britain." These words

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show, as the Appellant submits, that the authority to enter up judgments on the warrants of attorney was not confined to the courts of Ireland, and that English sterling money could alone be intended to be secured by such judgments, and not the currency of Ireland.

The advance made to Mr. Rochfort, or on his behalf, in pursuance of the contract, and on the security of the four bonds, was, in fact, made in English money (as admitted by the Respondent), by bills drawn in Ireland on the house of Noel & Co. in London (a fact also admitted by the Respondent). By the custom of merchants, bills of exchange drawn in Ireland upon England are always paid in English money, and *vice versa*, unless otherwise expressed; and as the dates and amounts of the bills are specified in the general books of account of Noel & Co. (which have been used in evidence by the Respondent) without any expression to denote that the same were paid in other than English money, it is manifest that such bills were, in fact, paid in English money. But the matter does not rest on probability; for there is the admission of the Respondent, and likewise direct evidence of the fact.

If, by any usage or practice in Ireland, the words "sterling good and lawful money of Great Britain," may at any time have been treated as meaning Irish currency, when the contract relates to Irish estates or property, and all the parties to the contract are domiciled in Ireland, such usage ought not to be held to affect parties to a contract who are not domiciled in Ireland, and still less for the purpose of reducing to the value of Irish currency, a security given for English money, *bond fide* advanced. But the Appellant submits that, in contracts between English and Irish parties, the words "sterling good and lawful

money of Great Britain," have but one meaning, and imply English money only: *Lansdowne v. Lansdowne* (c). The judgments respectively entered up on the bonds, and in pursuance of the warrants of attorney, purport to be at the suit of Richard Johnson, of Stratford-place, London, and after shortly reciting the bonds, are each respectively expressed to be for 5,000 *l.* sterling, and costs, and therefore, as the Appellant submits, the construction and amount of such judgments ought to be governed by the recitals, and to imply sterling English money, and not Irish currency. But even if it should be considered that, as the judgments were entered up in Ireland, the sums expressed therein are to be recovered in Irish currency, yet, as the Master was by the decree directed to take an account of what was due on foot of the judgments, and as the sums expressed in the judgments are penal sums, the Appellant submits, that under the decree he was entitled to have an account taken of the sums of English money *bond fide* advanced, with interest, to the extent of the penal sums of the judgments.

The next question regards the interest. The bonds having been executed, and the judgments entered up in Ireland, and the late as well as the present Mr. Rochfort being domiciled in Ireland, the security is exclusively Irish, although for English money; and therefore the Appellant submits, that he is entitled to have the account taken according to that rate of interest which the Legislature has fixed as the legal price of forbearance on debts upon Irish security, that is to say, at the rate 6 *l.* per annum upon every 100 *l.* In order to place a loan, exclusively secured upon

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estates in Ireland, on a par with one upon English security, it is necessary that it should bear six per cent. interest, and not five, which is deemed in law sufficient interest for forbearance on English security. Can it therefore be presumed, unless plainly expressed, that a debt bearing interest, contracted in England, and secured exclusively in Ireland, shall bear less than Irish interest? *Connor v. Earl Bellamont* (d).

The last question is, who is to bear the expenses of the exchanges?—The late Mr. Rochfort having from time to time made payments on account of the loan of 10,000 *l.* to the attorney of Noel & Co., in Irish currency, the house of Noel & Co. ought only to be held liable to credit the estate of Mr. Rochfort with so much on account, as such payments would produce in English money, at the rate of exchange of the day, on which such payments were respectively made, or as if such payments had been made in Bank of England notes, or in good bills on England. As Mr. Rochfort contracted for the loan in London, and became bound to parties domiciled in London, and the bills for the loan were drawn in Ireland upon England, whereby Mr. Rochfort had the benefit of the rate of exchange of the day on those bills, which was very considerable, his estate ought, in justice and good faith, to place Noel & Co. in the same situation as when they made the advance, by repaying the value of the money which his estate received; and, as the Appellant submits, this can only be done by adopting the fifth mode of taking the account, as found by the Master, that is, by treating the principal money as English principal bearing Irish interest, and the payments made on account to be calculated

at the rate of exchange of the day when they were respectively made. On the principle that repayment should be made where the money is advanced, the creditor is entitled to the expense of remittance. By the warrants of attorney, the judgments might have been entered up on the bonds in England. If an action had been brought for the money in England, the 10,000 *l.* would be recovered in British currency: *Scott v. Bevan* (e).

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Mr. *Knight* and Mr. *Jacob* for the Respondents:—There is no conflict between the Master's report and the decree, which is conformable to calculations of principal and interest in Ireland. The real points of this case are not yet brought before your Lordships. The question does not turn upon the conduct of the Appellant's agent, nor upon the merger of the bonds and warrants of attorney in the judgments, but upon the nature of the instruments of security. On the meaning of the words, "sterling" and "good and lawful money of Great Britain," in an Irish instrument, and in an Irish transaction, a judge in Ireland would not hear an argument; they are there taken to mean Irish currency, for that is decided in the case of the mixed moneys stated by Sir J. Davis. Good and lawful money of Great Britain, is the current money in Ireland. There is no Irish coinage; the same coinage is current in both countries, but at a different rate of value. The case of *Lansdowne v. Lansdowne*, on which the Appellant relies, was not decided in this House with reference to the words, "lawful money of Great Britain," (which words the Irish Court of Common Pleas held, in that very case, to mean Irish currency,) but

(e) 2 Barn. & Adol. 78.

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upon consideration of the whole instrument of settlement, its particular provisions, clauses and limitations, as appeared from Lord Eldon's observations in that case. In *Sproule v. Legge* (*f*), which was an action on a note made in Ireland for 161 *l.* sterling money, a witness proved that the currency of Ireland was called "sterling," and the Court did not say the contrary, but the action went off by reason of a defect in the declaration. In *Ladbroke v. Biggs* (*g*), a case tried in the Court of King's Bench in Ireland, the word sterling was taken to be Irish currency, and Chief Justice Bushe, referring to *Lansdowne v. Lansdowne*, observed that it would be going too far to limit the word "sterling" to English currency.

In the present case, bonds and warrants of attorney, bearing date the 3d of August 1801, were executed in Ireland, where G. Rochfort the obligor resided, upon Irish stamps, and according to the usual form of Irish securities; and the judgments were entered up on them in the Court of King's Bench in Ireland, in all respects as Irish judgments. All these circumstances put together, show the intention of the parties, and that the whole transaction had reference to Ireland. Robert Burrowes, acting on behalf of Richard Johnson and his co-partners, was the attorney on the record who entered up the judgments upon the bonds and warrants at the suit of Johnson; and Burrows, by an account subsequently furnished to G. Rochfort, the conusor of the judgments, and bearing date the 31st day of November 1804, treated the same as Irish securities, and the sums secured thereby, and the payments made on foot thereof as Irish money, and therefore the Appellant, as assignee of

(*f*) 1 Barn. & C. 16.

(*g*) 1 Batty, 619.

Richard Johnson, is bound by the acts of Burrowes, in relation to the bonds and judgments, and the sums secured thereby. Burrowes was well acquainted with all the transactions between the parties, and with their intentions in respect to these securities. The judgments entered up at the suit of Richard Johnson against Gustavus Rochfort, are, in form and substance, declarations on record, that the sums of money respectively secured thereby were of Irish currency, and that by the entry of the judgments, the Appellant, as assignee of same, is stopped from averring that they were entered up as securities for English money, and not for Irish money, according to the tenor and effect of the records of the several judgments.

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But the Appellant contends that the payments made in respect of the bonds, were in English currency. If that was so, the party paying paid in his own wrong. Mr. Rochfort was not a party to that payment. He executed the securities in Ireland, and he paid in Irish currency. If the Appellant's partners allowed Grange & Co. to draw bills for English currency, that was their fault; and Mr. Rochfort had no knowledge of the way in which the drafts were to be paid. Is an Irishman to pay more to an English creditor than to a creditor in Ireland? If these transactions were between Irishmen only, could the creditor be heard to say that he should be paid in British currency? If any mistake had occurred in the execution of the bonds and warrants, or in the entry of the judgments, by reason of the same respectively having been executed and entered up for Irish, and not English, money, and if proof of such mistake would have altered and extended the effect of those instruments, the Appellant should have put such mistake in issue by his bill, and prayed relief

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accordingly; but not having done so, it was not competent for him, upon the pleadings in this cause, to make such a case either in the Master's office or at the hearing of the cause.

If the Appellant had brought his action on the bonds and judgments in Ireland, and recovered, would not the sum adjudged to him be of Irish currency? In the bill filed in Ireland, the debt is stated simply at 10,000*l.*, which must, in Irish pleadings, mean Irish currency. The word "British," does not occur in the bill; there is no distinction, and no case is made by the bill for any such distinction. The prayer is for an account of what is due under the judgments, making no case for an account in English currency, which the Court below held that the plaintiff was bound to make in his pleading, if he meant to insist upon an account in a currency different from that of the place of jurisdiction. If the question had been put in issue by the pleadings, the Respondent might have met the special case, which is for the first time raised upon the hearing and the appeal.

With respect to the claim of exchange, it is to be observed, that there might be a distinction between what is paid and what remains to be paid, if there was any ground for the claim at all. The creditor, who has an option to sue the debtor where he pleases, has, in this case, obtained judgment on a bond in Ireland. The bond debt merges in the judgment. The defendant might have paid the money on the judgment into court, in Ireland. Suppose execution had issued upon the judgment, could the sheriff have insisted upon the exchange? It is argued, that the action might have been brought in England upon the judgment in Ireland. The case might then have been different, and it might have been contended, that

the rule in *Scott v. Bevan*(*h*) applied. There is a later case than that, and one more in favour of the Respondent. It is *Delegal v. Naylor* (*i*), which was, in effect, a question how to value Peruvian *billetes* in English money, and it was rightly held, that their value should be estimated as the value of a bill of exchange for the amount of dollars named in them. But such a decision does not bear closely upon a question as to what is to be paid upon a judgment.

As to the interest, should it be held that the sum secured by the bonds was an Irish debt, the Respondents could not object to the Irish interest of six per cent. on what remained unpaid of the original debt.

Mr. *Pemberton*, in reply. The case of *Ladbroke v. Biggs*, cited from Batty's Reports in Ireland, is now mentioned for the first time, and it is to be doubted whether the facts there stated warrant the conclusion of the Judges. Upon the authorities cited, it is clear that bills are payable in the currency of the country where the acceptors reside. The bills in this case were, by the agreement, to be drawn on bankers resident in London, as the mode by which the advance was to be made, and credit to be given in their books to the borrower. This is admitted in the Respondent's answer. The bonds were to secure the money thus advanced, and the expression contained in them, if ambiguous, is at least applicable to British money, which was in fact advanced. If the contract had been in Scotland, could it have been contended, that an advance of 10,000 *l.* sterling could be repaid by 10,000 *l.* Scotch? As to the argument that the debt may stand British money, but that the security is only for Irish currency,

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(*h*) 2 Barn. & Adol. 78.
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(*i*) 7 Bing. 460. 5 M. & P. 443.
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the answer is, that the judgment might, under the warrant of attorney, have been entered up in the Courts in England; how then is it a transaction merely Irish? The language, if doubtful, must be construed by the context. Even if this was a transaction between Irish parties only, it does not follow that the loan was to be paid in Irish currency. In *Ladbroke v. Biggs*, the expression was not "money of Great Britain," but "sterling" only. The Judges, to save the sufficiency of the stamp, held "sterling" to mean Irish currency. Great Britain is not Ireland, and whatever the difference between "money of Great Britain," and money "current in Great Britain," may be, there is no authority to show that "sterling money of Great Britain," has ever been considered to mean Irish currency.—[He again referred to and relied on the judgments of Lords Eldon and Redesdale in *Lansdowne v. Lansdowne*, on this point.]

As to the rate of exchange, it is argued for the Respondent that, if the creditor sues the debtor in the country where the debtor resides, he must receive his debt in the currency of that country. There is no authority for that proposition; and if it is true, this case ought to be an exception, for the creditor is compelled to follow the debtor to his domicile, where his property is situated. In this case, execution on the judgment would have been stayed only upon the terms of doing equity; and that would be upon paying the costs of exchange, and putting the creditor in the same situation as if he had sued in England. In *Scott v. Bevan*, the creditor sued in England, and the debt was paid with the expense of remittance. *Delegal v. Naylor* was decided on the same principle.

As to the supposed inconsistency arising from the payments received on account, and that which now

remains to be paid, it is imaginary. The difficulty will easily be solved upon further directions; the question to a certain extent is involved in the exceptions. The money so paid was not received in Ireland, it was paid to bankers there, and then remitted to the creditor in England, *minus* the exchange. The question is, what credit upon these remittances is to be given by the Appellant? If it was an English transaction of loan, upon a sound construction of the contract, the creditor would be entitled to receive back in London the money advanced there, together with the expense of remittance.

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The *Lord Chancellor* moved the judgment this day:—My Lords, this was an appeal from a decree of the Court of Chancery in Ireland, the effect of which was, that Sir G. Noel, who represents the interests of a banking-house which had formerly existed in London, claiming as a creditor upon the estate of Mr. Rochfort, deceased, now represented by the Respondent, Gustavus Rochfort, was to have the amount of his debt paid in Irish currency. The question discussed upon this appeal was, whether that direction of the Court of Chancery in Ireland was correct or not.

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It appeared that Mr. Rochfort was desirous, in the year 1801, of entering into a partnership with a mercantile establishment in Dublin, and that not having the means at command of raising the money which was required for the purpose of paying his portion of the partnership capital, which was the sum of 10,000 *l.*, he entered into an engagement by which the banking-house in London was to give him credit to the amount of 10,000 *l.*; and the mode in which that sum was to be so advanced to Mr. Rochfort, as his

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portion of the capital of the establishment in Dublin, was by the house in Dublin drawing upon the banking-house in London. This loan was, of course, to be secured to the London house. Mr. Rochfort lived in Ireland. The money was drawn from the banking-house in London, as had been proposed, and the securities taken were four bonds, each for 5,000 *l.*, from Mr. Rochfort, who was then residing in Dublin, and the bonds were executed in Dublin. The loan was further secured by judgments to the amount of 20,000 *l.* on the bonds, four judgments of 5,000 *l.* each, under warrants of attorney executed by Mr. Rochfort. The ground upon which the Court of Chancery in Ireland came to the conclusion that Irish currency was to be the measure of the repayment of this loan, appears to have been, that the bonds were executed in Dublin, and that the debt was secured by Irish judgments.

The bonds were in these terms: each bond was in a penalty of 5,000 *l.* to secure 2,500 *l.* "sterling, good and lawful money of Great Britain." The obligor was described as of the county of Westmeath; the obligees were described as of London, and, of course, the payment was to be to the obligees so described as residing in London. The warrants of attorney given on the bonds were to enter up judgment "in Ireland, Great Britain, or elsewhere;" and the amount of money to be secured by those judgments was expressed in the warrants of attorney in precisely the same terms as the security was expressed upon the face of the bonds; namely, "sterling, good and lawful money of Great Britain." Judgments were entered up under the several warrants of attorney. The judgments were for 5,000 *l.* "sterling," there was, therefore, a security for 20,000 *l.* sterling, by the four

judgments; the prior transaction of the bonds, and the warrants of attorney proving that the loan was for 10,000 *l.*, and the payment reserved upon the bonds, and declared to be secured by the warrants of attorney, being each for 2,500 *l.* “of sterling, good and lawful money of Great Britain, with legal interest.”

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It is proved in this case, by the instruments of security, by the correspondence, and by the evidence in the cause, that, in point of fact, the 10,000 *l.* were advanced in London, by drafts drawn upon a house in London, and paid, of course, in English money; and that the parties, therefore, who advanced the money, parted with 10,000 *l.* of lawful money of Great Britain, current in Great Britain. There was a variety of money transactions between the banking-house in London and the mercantile establishment in Dublin, the result of which was, that a very large sum became due to the London house, and part of it was secured upon some lands of Mr. Rochfort, in Ireland, which gave rise to a bill of foreclosure, and it is part of the evidence in the cause, that Mr. Rochfort, in his answer to that bill of foreclosure, admitted that the bonds and judgments were to secure the 10,000 *l.* advanced by the banking-house in London, in the way which I have stated. That fact, besides being distinctly admitted, and appearing, indeed, on the face of the instruments, is also proved by various letters, and the evidence in the cause. It may, therefore, be taken as a fact not disputed, and upon which the legal results must necessarily ensue, that the 10,000 *l.* were advanced in London, in the currency of this country.

A suit was afterwards instituted for the purpose of administering the estate of Mr. Rochfort: and in that

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suit the ordinary decree was made in the year 1831, by which it was referred to the Master, to take an account of what was due to the plaintiff upon the "four judgments obtained by Richard Johnson against Gustavus Rochfort, deceased, as of Trinity Term 1801, for principal, interest, and costs." The Master made his report upon the 31st May 1833; and in that report, he states that Gustavus Rochfort, on the 3d of August 1801, "executed his four several bonds, and warrants of attorney for confessing judgments thereon, to Richard Johnson (now represented by Sir Gerard Noel), in trust for himself and the other persons in the firm of Edward Templer & Co., each in the sum of 5,000 *l.* sterling, lawful money of Great Britain, conditioned for the payment of 2,500*l.*, of like lawful money, and which bonds," he found, "were executed in Ireland;" and he found "that the said Richard Johnson did, in or as of Trinity Term 1801, obtain four several judgments on said bonds, in His Majesty's Court of King's Bench in Ireland, against the said Gustavus Rochfort, deceased, each in the penal sum of 5,000 *l.*" He found "that the sum of 10,000 *l.*, secured by the said four bonds, was advanced and paid by the said Richard Johnson, as one of the partners in the said banking-house of Noel, Templer & Co., to the said Gustavus Rochfort, or for his use, in British currency, and that there is due to the plaintiff the sum of 8,441 *l.* 13 *s.* 6 *d.*, being principal and interest, at five per cent., as appears by the second schedule to be in my report annexed. But on the part of the defendant it was contended, that the said bonds and warrants having been executed in Ireland, and the judgments thereon entered in the Court of King's Bench in Ireland, it appears from an account furnished by Robert Bur-

rowes, esq., as attorney for the said banking-house, in the year 1804, proved in this cause as Exhibit A., that the said Robert Burrowes, as such attorney and authorized agent of plaintiffs, in that account treated the sums so advanced as Irish currency, and charged interest at the rate of six per cent.; and that I should treat the sum secured as principal money Irish currency, and report accordingly. On the part of the plaintiffs, it was contended, that I should treat the sum advanced as British currency, and payable with British interest, at five per cent.; and after I had prepared the draft of my report, in which I treated the sum advanced as British principal and British interest, the same counsel contended, that I should report that the sum advanced, being British principal on Irish security, should be liable to six per cent. interest, and that I should report that the plaintiffs were entitled to the exchange on the payments made by the defendant at the rate of the day; but the defendant insisted that, under any circumstances, he was not liable to any exchange, but was entitled to make the payments in Ireland, without reference to any remittances in London." The Master then says, that he concurred in opinion with the defendant upon that point, and proceeds thus:—"But, with a view to save time and expense, I have taken the accounts in five different ways: first, as British principal, at five per cent. interest; secondly, as Irish principal and Irish interest; thirdly, as British principal and English interest, with exchange on the payments made by the defendant, at the rate of the day; fourthly, as British principal and Irish interest, as on securities executed in Ireland; and lastly, as British principal and Irish interest, with exchange on payments made by the defendant, at the rate of the day." And he sub-

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mitted to the Court which of those several modes of taking the account ought to be adopted. Then the Master states what, according to those different modes of taking the account, would be the sum due to the Appellant.

The Master, therefore, finds the facts which are not disputed. There is no exception to the report as to the mode in which the money was advanced; viz., that it was advanced in London, in British money, and transmitted to Ireland, and there secured by the bonds and judgments, the substance of which I have stated. The Master also reports, that Robert Burrowes, the attorney for the London banking-house, in the year 1804, deposed in this case, that he, as such attorney and authorized agent of the plaintiffs in that account, treated the sums so advanced as Irish currency. Upon this point an exception was taken to the Master's report, founded upon a supposed statement in the report, that Mr. Burrowes had been the attorney and authorized agent for the purpose of settling this account. That exception was overruled, and I think correctly overruled; not because there was evidence that Mr. Burrowes had been an agent authorized for that purpose, but because the Master did not find in his report that he was such authorized agent. He merely stated that he acted as such authorized agent, and in that character had settled the account; whereas the proposition raised in the exception was, that the Master had found that he was the authorized agent for the purpose of settling the account. But that is not very material for the purpose of deciding the merits of the case. The exception raised a point which was not raised upon the face of the report; and I think there is no ground of complaint on account of the exception having been

overruled. That, however, leaves the question between the parties entirely open upon the facts, as to this point, stated and proved in the cause. The real and substantial ground of appeal is, the declaration and direction of the order, that the account, as taken by the Master, treating the sum secured by the four bonds as Irish currency, and bearing interest at six per cent., should be allowed. The effect of that decision is, that the debt of 10,000*l.*, advanced in London, in English money, in a suit in which the debts of the borrower are to be paid, is to be considered as satisfied by 10,000*l.* Irish currency, being of much less value.

The first question which occurs is, what must have been the intention of the parties at the time when this transaction took place? It is no unusual thing to lend money in this country upon Irish or colonial securities. Is it necessary that the lender should guard himself by a special contract from a conclusion in law, that the debt is to be repaid, not in the currency and according to the value at which it was advanced, but that it is to be repaid in the money of the country where the borrower may happen to live, or in the country where the instrument is executed for the purpose of securing the debt? Two grounds were principally relied upon by the Respondents:—First, that the securities, the bonds, and the judgments were Irish; secondly, that Mr. Burrowes, the attorney in Ireland for the plaintiff's house in England, had settled accounts in which he had treated the loan as payable in Irish currency. As to the securities, the question hardly arises, the bonds and warrants of attorney being in their terms to secure “sterling, good and lawful money of Great Britain.” The judgments, indeed, are for sterling money only,

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which it is said is a term used in Ireland to denote the currency at that time prevailing in Ireland. But the judgments in this case do not constitute the debt. If they did, the 20,000 *l.*, and not the 10,000 *l.*, would have been the sum to be recovered. But the judgments are mere securities for the debt really due; and if it be true that the debt would have been satisfied by the payment of 10,000 *l.* Irish currency, which is one of the arguments insisted upon, it only proves that the security was of less value than was supposed, not that the debt secured was to be discharged by a payment of less money than was advanced. A security may be taken in goods, in lands, or in judgments for Irish money, or French money, or any other description of money, and the amount of the debt to be secured remains the same. The question is, what is due upon the security, not what is the value of the security itself. But the question of what is due upon the security, can only be answered by looking at the origin of the transaction, and the contract between the parties. The origin of the transaction was the advance of 10,000 *l.*, English money; and the contract established by the bond, was to repay the sum in "sterling, good and lawful money of Great Britain." How can such a debt, under such a contract, be satisfied by a payment in Irish currency?

In support of the Respondents' claim, no case was cited which really supported their proposition. On the part of the Appellant, the case of *Lansdowne v. Lansdowne* (*k*) was cited. In that case, a marriage settlement of English and Irish estates, contained a power to charge the Irish estates with a jointure of 3,000 *l.* "of lawful money of Great Britain," and the

(*k*) 2 Bligh, 60.

power was executed by a charge of 3,000*l.* “of lawful money of Great Britain.” In a suit to recover that jointure, a question arose in the Court of Chancery in Ireland, as to whether that jointure was to be paid in English or in Irish money. A case was sent by that Court to the Court of Common Pleas in that country, which Court certified that the jointure was payable in Irish currency, and the Court of Chancery so decreed ; but upon an appeal to this House, that decree was reversed, and it was declared, that the jointure was payable in English, and not in Irish currency. In that case, a rent-charge issuing out of an Irish estate, which was described as 3,000*l.* “of lawful money of Great Britain,” was, by the force of those words, connected with the history of the transaction, held to be payable in English money. Must not then the same words have at least an equal effect upon a loan contracted in England, not charged by the contract upon any Irish property, but secured by a bond executed indeed in Ireland, and by a judgment in that country, but the bond being so executed in Ireland, and the judgment obtained there, probably only because it happened that the obligor was living in that country, the warrants of attorney, moreover, enabling the party to enter up judgment in Ireland, in England or elsewhere.

It appears to me, therefore, upon principle, and on the authority of that case of *Lansdowne v. Lansdowne*, that the 10,000*l.* were payable in English money, and this, which I consider as proved to be the contract between the parties, cannot be affected by what Mr. Burrowes, the Irish attorney of the London house, appears to have done. It is not pretended that he had any authority to alter the contract, or to enter into any new contract between the parties. It is

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natural enough, that he, an Irish attorney, settling the account in Dublin, should have treated the money as money to be estimated in Irish currency, but that cannot alter the rights of the parties.

The next question regards the interest on the debt; and it must be again observed, that this is not the case of a debt secured upon Irish property. The opinion which I have expressed, as to the former part of the case, proceeds upon the ground of the transaction, and the contract having been altogether English. It follows from that view, that the meaning of the parties must have been to secure legal interest; that is, legal interest according to the law of the country in which the contract was made, and in which the money was advanced. In the case of *Connor v. Lord Bellamont* (1), which is but imperfectly reported, and which was cited in order to show that Irish interest ought to be allowed, there was upon the face of the contract, according to the report, a reservation of seven per cent., and that was a charge upon lands in Ireland.

The only remaining question is, whether the money is to be paid as if payable in Ireland, or whether it is to be calculated as if payable in London; that is, whether the exchange existing at those periods between the two countries, is to be taken into the account. The contract is silent as to the place of payment. But it cannot be supposed that London bankers, advancing money in the course of their business, look to payment in any other place than where they are carrying on their business, that is, in London. Had the borrower happened to be in England, the bonds would have been English, and the judgments would have been English. Here the whole transac-

(1) 2 Atk. 382.

tion was English, and, in such a case, the lenders have a right to receive payment where the money is advanced. Such was the principle of the decision in the case of *Phipps v. Lord Anglesea* (*m*), although there was a charge, in the settlement, upon lands in Ireland. In the case of *Lansdowne v. Lansdowne*, Lord Eldon thought that the jointure, though payable in English money, was not payable in England; but in that case there was no contract for payment, the right existed only in the charge. It was a charge that affected property in Ireland. Lord Eldon, in that case, alludes to the case of *Phipps v. Lord Anglesea*, and several other cases, with approbation.

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I am, therefore, of opinion, that the account must be taken upon the footing of money to be paid in London, that the re-payment is to be with interest at five per cent., and that the calculation must be made with allowance, according to the rate of exchange at which the several sums of money were remitted from Ireland to this country. If that should be your Lordships' opinion, the object will be carried into effect by substituting a declaration in lieu of that which now appears in the decree. As the decree now stands, it "declares that the Master, in calculating the sum secured by the four bonds, ought to consider them as Irish currency, bearing interest at the rate of six per cent." The substitution which I would submit to your Lordships is this, that the Master, in making his calculation, should consider the debt as English money, bearing interest at five per cent., and payable in London, that is, with the value of the exchange, at the rate of the day, and that the interest of five per cent. should be calculated upon such a sum as shall

(*m*) 5 Viner's Abridg. 209, pl. 8.

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appear to be due, consisting of principal and interest. I therefore move your Lordships, that the decree of the Court of Chancery be varied accordingly.

“ It is *ordered* and *adjudged*, &c., that so much of the said decree as is complained of in the said appeal, be and the same is hereby affirmed, except so far as it declares that the account taken by the Master, treating the sums secured by the four bonds, in the said report mentioned, as Irish currency, and bearing interest at the rate of 6*l.* per cent. per annum, should be adopted; and in lieu thereof, it is ordered and directed, that the sums secured by the four bonds, in the said report mentioned, should be treated as principal money of English currency, bearing interest at the rate of 5*l.* per cent. per annum, payable in London, with exchange on the payments made by the late Gustavus Rochfort on foot of the said bonds, at the rate of the day on which the same were paid or remitted from Ireland; and that the sum of 9,197*l.* 16*s.* 2*d.* found due by the Master in his said report, treating the sums secured by the said four bonds in the manner hereby directed, with interest at the rate of 5*l.* per cent. per annum on the sum of 3,849*l.* 16*s.* 6*d.*, being the principal sum remaining due on the foot of the said bonds, from the 12th day of April 1833, the day to which the Master calculated the interest in his said report, are charges on the lands and premises in the pleadings mentioned. And it is further ordered, that, with this variation, the cause be remitted back to the Court of Chancery in Ireland, to do therein as shall be just and consistent with this judgment.”
(68 *Journ.* 872.)

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10 May.
20 August.

A P P E A L

FROM THE COURT OF CHANCERY.

EDWARD OAKELEY - - - - - *Appellant.*SARAH HAUGHTON PASHELLER, and }
others - - - - - } *Respondents.*

BY ORIGINAL APPEAL.

EDWARD OAKELEY - - - - - *Appellant.*PHILIP CASTEL SHERARD, Executor of }
the said Sarah Haughton Pasheller } *Respondent.*

BY REVIVOR.

R. and S., partners in trade, executed in the year 1811, four joint and several bonds to O., to secure re-payment of 10,000 *l.*, advanced to them by his acceptance and payment of four bills of exchange, amounting together to that sum. Two of the bonds were made payable in 1817, and two in 1818. S. died early in 1815, and his executors agreed with R. and with K., who was then in partnership with R., in place of S., that R. and K., in consideration of the outstanding debts and effects of the former partnership, would pay certain sums to the executors, and would also indemnify S.'s estate against certain scheduled debts, including these bonds. No notice of that agreement was given to O. He continued to receive interest on the bonds from the new firm as well after as before they became due; and the annual accounts which they furnished to him contained an account of the dividends due to him on 17,000 *l.* stock, which he lent to the new firm. From O.'s correspondence with that firm in 1820, it appeared that he had, in 1817, given them three years further time for payment of

*Bonds, Joint
and Several.
Obligee giving
time to one Ob-
ligor discharges
the other.*

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HE BONDS, AND THAT IN 1822, HE GAVE TWELVE MONTHS FURTHER TIME. THESE FAVORABLES WERE GRANTED WITHOUT CONSENT OF S.'S EXECUTORS. IN 1822, O. TOOK FROM R. AND K. A COLLATERAL SECURITY FOR PAYMENT OF THE DEBT, EXPRESSLY RESERVING HIS RIGHT AGAINST S.'S ESTATE IN RESPECT OF THE OBLIG. BUT CONCERNING THAT ARRANGEMENT FROM S.'S EXECUTORS. IN 1822, S.'S EXECUTORS, TO WHOM HE HAD ASSIGNED THE OBLIG. BEFORE HIS DEATH, APPLIED FOR PAYMENT OF THEM TO S.'S EXECUTORS, WHO THEREUPON FILED THEIR BILL, PRAYING THAT IT MIGHT BE DECLARED THAT THEIR TESTATOR'S ESTATE WAS DISCHARGED FROM THE OBLIGS.

Held, that the discharge granted by O., for payment of the OBLIGS. IN 1817, WITHOUT CONSENT OF S.'S EXECUTORS, HAD THE EFFECT OF DISCHARGING HIS ESTATE.

MR. GEORGE REID and the Rev. Philip Castel Sherard agreed, in January 1810, to carry on the business of West India merchants, in partnership, in Mincing-lane, London, under the firm of George Reid & Co., for a term of seven years, determinable, however, on the 1st day of May, which should next happen after the death of either of them during the said term; and it was by the partnership articles stipulated, that if such event should happen, the accounts of the partnership business should be made up to that day, and the stock and effects valued as therein mentioned. In the second year of the said partnership, Sir Charles Oakeley, the father-in-law of Reid, in order to promote his success in business accepted four bills of exchange for 2,500*l.* each, drawn upon him by Reid and Sherard, under the said firm of George Reid & Co., and payable to their order—two payable at three months, and two at six months, after their dates—and for the purpose of securing to Sir C. Oakeley the re-payment of all such sums of money as he should

become liable to pay, and should actually pay in respect of the said bills, Reid and Sherard executed to him four joint and several bonds, in the penal sum of 5,000*l.* each, with conditions for making the same void, if Reid and Sherard, their heirs, executors or administrators, should pay to Sir C. Oakeley, his executors or administrators, as to two of such bonds, on or before the the 15th day of October 1817, and as to the other two of such bonds, on or before the 15th day of January 1818, all such sums of money as Sir C. Oakeley, his executors or administrators, should or might have paid in honour and discharge, or on account of the said bills or of any renewed or other bill or bills, note or notes (if any) which should be drawn upon and accepted by Sir C. Oakeley, at the request or on account of Reid & Co., in lieu of the said bills, or any of them, together with interest on such sum or sums at the rate of five per cent. per annum, to be computed from the respective times of paying the same. All the bills and bonds were dated the 12th of July 1811. The bills were negotiated, and Sir Charles Oakeley paid them as they respectively became due, to the amount, in the whole, of 10,000*l.*, whereby that sum became due to him from Reid and Sherard, upon the security of the said bonds. Reid and Sherard gave him credit in account for the said sum, and paid him the interest thereon from time to time.

P. C. Sherard died in November 1814, having by his will, dated the 24th of August 1809, appointed his widow, and his brother, the Rev. George Sherard, and Sir Simon Haughton Clarke, his trustees and executors of his said will, and they shortly afterwards proved the same in the proper Ecclesiastical Court.

George Reid, as the surviving partner of the firm,

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continued to carry on the partnership business until the 1st of May 1815, when, under the articles, the same became determined (notice whereof was published in the London Gazette), and the accounts of the partnership were made up by Reid to the said 1st May, and the partnership stock and effects valued in manner prescribed by the said articles. Shortly afterwards, and before any of the four bonds became payable, George Reid entered into partnership in the said business with Mr. Roger Kynaston, who was also a son-in-law of Sir Charles Oakeley; and by articles of agreement, dated the 8th June 1815, and made between George Reid, of the first part, Sarah Haughton Sherard, Sir Simon Haughton Clarke and George Sherard, as executors as aforesaid, of the second part, and the said Roger Kynaston, of the third part, after reciting that it had been agreed that Reid should be entitled to all the outstanding debts and effects of the partnership between him and Sherard, (except certain debts therein mentioned,) upon paying to the said executrix and executors of P. C. Sherard, the sum of 3,805*l.* 5*s.* 8*d.*, and securing to them the sum of 49,622*l.* 16*s.* 6*d.*, with interest, from the 1st of May then last, and indemnifying the said executrix and executors from all the outstanding debts and engagements of the said partnership, specified in the first schedule thereunder written, by the joint and several bonds of Reid and Kynaston, in the penalty of 150,000*l.*, it was witnessed that Reid did thereby covenant and agree with the said Sarah H. Sherard, Sir S. H. Clarke and G. Sherard, that he would, as soon as conveniently might be, assign all the debts specified in the second schedule to the said agreement, unto two trustees, to be named by both parties as therein mentioned, for securing the payment of the promis-

sory notes therein mentioned, to be given by Reid and Kynaston for the payment so to be made to Sarah H. Sherard, Sir S. H. Clarke and G. Sherard, as such executors as aforesaid, and after payment thereof, in trust for Reid, his executors, administrators and assigns; and Reid and Kynaston did thereby covenant and agree with Sarah H. Sherard, Sir S. H. Clarke and G. Sherard, as such executors, that they would, after the execution of the said agreement, execute and deliver to Sarah H. Sherard, Sir S. H. Clarke and G. Sherard, as such executors, a good and sufficient bond in the penalty of 150,000*l.*, conditioned for the payment of the outstanding debts and engagements of the said partnership, specified in the first schedule to the said agreement, and also against all debts due in respect of the ships belonging to the said partnership, and for indemnifying Sarah H. Sherard, Sir S. H. Clarke and G. Sherard, as such executors, against all claims in respect thereof.

The first schedule to the agreement contained, amongst other particulars, the following entry: "Sir C. Oakeley, 10,000 *l.*," referring to, and intending to express the amount secured by the said four bonds. No notice of the agreement was given to him by the executors of P. C. Sherard. The promissory notes so agreed to be given by Reid and Kynaston, were accordingly given, and have all been paid, but the bond of indemnity from them, was never given to the executors of P. C. Sherard, nor was any other instrument executed in pursuance of the provisions of the said agreement.

Reid and Kynaston continued the business, under the same firm of George Reid & Co., in partnership together until the year 1826, when Reid died. They adopted the debt of 10,000 *l.* due to Sir Charles Oake-

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ley, and gave him credit for it in account, and paid him interest thereon. The Appellant, Edward Oakeley, son of Sir C. Oakeley, was a clerk in their house, with a prospect of becoming connected with them as a partner; Sir Charles was apprised by them of the arrangement which they formed for continuing the business. Annual accounts were made out from time to time by Reid and Kynaston, and transmitted to him, in which he was credited with the said sum of 10,000*l.*, and the interest thereon, and debited with payments which they made for the interest. He accommodated them with a further loan of about 17,000*l.* stock, and the same annual accounts comprised this sum, and the dividends which became due to him in respect thereof, and the payments which they made for such dividends. In a correspondence between him and Kynaston, the debt of 10,000*l.* was spoken of and referred to as a debt due from the house of Reid and Kynaston, and it was in all respects treated as a debt from them.

In the year 1818, George Sherard died, leaving the said Sarah H. Sherard and Sir S. H. Clarke, his co-executors, him surviving, and Sarah H. Sherard intermarried with Mr. John Pasheller.

When the four bonds became payable in 1817 and 1818, no application was made to the executors of P. C. Sherard for payment. In a suit in Chancery, *Sherard v. Sherard*, instituted in 1815, by some of P. C. Sherard's legatees, against his representatives for the administration of his estate, a decree was pronounced in February 1818, referring it to the Master to take the usual accounts of his assets and of his debts; and advertisements were duly published in the usual manner, calling upon his creditors to come in and prove their debts under the decree. No claim was made

under that decree in respect of the bonds, until as hereinafter mentioned.

It appeared from numerous passages in a correspondence between Sir C. Oakeley and Reid and Kynaston, that in 1817 or 1818, Sir C. Oakeley agreed with Reid and Kynaston, or consented, at their request, to allow the said sum of 10,000*l.* to remain in their hands for their use, and as a loan to them, and not to call on them for payment thereof for a period of three years. Sir Charles, in a letter to Mr. Kynaston, dated the 18th of September 1820, expressed himself as follows:—"The bonds of the house which were granted to me in 1811 and 1812, payable in six years, and *the payment of which was suspended for three years longer*, in consequence of my engagement in 1817, will become due on the 15th of October and 15th of January next, at which periods I hope it will be convenient to the house to discharge them." In another letter to the same, dated the 5th of October 1820, after mentioning to the effect, that he was desirous of placing his property on real or Government securities, he expressed himself, with reference to the said sum, as follows:—"Under the circumstances above stated, I must candidly confess to you, that it would not be convenient to me to enter into any new engagements for continuing the advance of 10,000*l.* *beyond the term of my former agreement.*" In answer to further applications made by Mr. Kynaston, on behalf of himself and Reid, proposing some arrangement for the advancement of the Appellant, and, with reference thereto, requesting Sir C. Oakeley to allow further time for payment of the said sum of money, he wrote a letter to Kynaston, dated the 14th of October 1820, in which occurs this passage: "I expressed in my last letter, that it would not be convenient

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to me to enter into any new engagements for continuing my advance, but this arose from the circumstances explained in the former part of my letter, and not from any desire to subject the house to the smallest inconvenience, or a wish to receive payment of my loan without waiting any further proposal on Edward's behalf. *On the contrary, I shall be happy to wait twelve months* (the time you require), in order to receive such a proposal, trusting it will be of a nature calculated as much as possible to meet the wishes I have communicated respecting the final arrangement of my pecuniary concerns."

In the year 1823, Sir C. Oakeley having pressed Reid and Kynaston to give him some security for the said sum of 10,000*l.*, it was proposed that they should for that purpose, assign to him certain policies of insurance, and a draft of the proposed assignment was prepared. Mr. Burfoot, the solicitor of Sir Charles, not being aware of the engagements entered into for continuing the loan to Reid and Kynaston, and supposing that the estate of P. C. Sherard was still liable on the said bonds, proposed that such intended security should be communicated to his executors, and that they should be requested to assent thereto, in order that his estate might not be discharged from the bonds. Reid and Kynaston, or their solicitor on their behalf, thereupon represented that, if such proposed security were communicated to the executors, they would call upon them to pay the bonds, and indemnify the estate of P. C. Sherard therefrom, and requested that the said proposed security might not be communicated to the executors. Sir C. Oakeley consented to that request; and Mr. Burfoot, as his solicitor, consulted with counsel about the mode in which such security could be framed, so as that the

same might be concealed from the executors of P. C. Sherard, without discharging his estate.

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This transaction is stated in the following extracts from letters which passed on the occasion between Mr. Burfoot and Sir C. Oakeley. Mr. Burfoot, in a letter dated the 11th of August 1823, asks Sir Charles, "Is it your intention to give up your claim upon Mr. Sherard, or his estate, by virtue of the bonds? If not, I must advise with my conveyancer, how far taking another security from his co-obligor, will have the effect of releasing him, or rather his estate, as I believe that he is not living." Sir Charles wrote, in answer to Mr. Burfoot, a letter, dated the 13th August 1823, in part as follows:—"I always considered Reid and Sherard jointly and severally responsible for the bills, amounting to 10,000*l.*, which I had paid; but, thinking myself quite secure without calling upon Mr. Sherard's executors after his death, I have yet taken no steps for that purpose. Whether any thing can now be obtained from Mr. Sherard's estate, by virtue of the bonds, you can perhaps easily ascertain; but the matter seems more immediately to concern his co-obligor, Mr. Reid, who has undertaken for the security of the whole demand." During the treaty for further security, Mr. Burfoot wrote to Sir Charles a letter, dated the 18th December 1823, and in part as follows:—"As to the assignment of the policies, and giving notice to Mr. Sherard's executors, some difficulties have arisen: when the draft assignment was sent to Mr. Le Blanc for perusal, on the part of Messrs. Reid & Co., he informed me, that they had already assigned the debt due from Mr. Beckford, to Messrs. Woodbridge, Dyer & Co., as a running security for certain advances; consequently, that they could not assign any portion of that debt, as we had

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proposed, but only the policies to you; and he objected to applying to Mr. Sherard's executors for their consent to taking the collateral security, inasmuch as that would have the effect of their insisting on Messrs. Reid & Co. immediately discharging the bonds, which would not be convenient for them to do; and he submitted, that, taking a collateral security from one of the obligors, would not discharge the estate of the other. Upon this latter point, we have seen Mr. Preston this morning, who considers that, provided no time be given for the payment, that is, that the payment is not by express words in the deed postponed to a future day, it will not operate as a discharge to Mr. Sherard's estate; and that, if we cannot get an assignment of Mr. Beckford's debt, we must be satisfied with the policies. We shall therefore alter the deed accordingly, and endeavour to get it executed by Mr. Kynaston before he returns to Paris." Sir Charles Oakeley in answer, wrote to Mr. Burfoot a letter, dated the 20th December 1823, and in part as follows:—"With respect to the application to Mr. Sherard's executors, I am certainly not disposed to take any step which might embarrass the house, and I am glad to find that my abstaining from the application at this time, will not affect any claim on the executors, since there is no stipulation in the bonds for postponing payment to a future day."

An assignment of the policies, was accordingly executed, bearing date the 18th of December 1823, and made between Reid and Kynaston, of the first part, Sir C. Oakeley, of the second part, and his son Edward Oakeley (the Appellant), of the third part. It recited (amongst other things) that there was then due to Sir C. Oakeley, on the said bonds, the principal sum of 10,000*l.*, all interest having been paid

up to the date thereof; and that P. C. Sherard had died, and that Reid had subsequently formed a partnership with Kynaston, and that such partnership had, since its formation as between themselves and the executors of P. C. Sherard, assumed the said debt of 10,000*l.*, and paid the interest of the same to Sir C. Oakeley, but he, Sir Charles, had not in any manner discharged the estate of P. C. Sherard from the payment of the several sums secured by the said bonds, and that in order collaterally and further to secure the payment of the said principal sum, and interest thereafter to grow due in respect of the same, but expressly without prejudice to the said four several bonds, or to any remedies which Sir C. Oakeley might possess against either of the parties sealing the same, or against their estates, and in particular against the estate of P. C. Sherard, Reid and Kynaston had agreed to assign, and they thereby assigned to the said Edward Oakeley, his executors, administrators and assigns, several policies of insurance therein mentioned to have been effected on the life of Horace William Beckford, Esq., for sums making together 10,000*l.*, and the benefit thereof, upon the trusts therein mentioned, for further and collaterally securing the sum of 10,000*l.* due on the said bonds; and they thereby jointly and severally covenanted for the payment of the said sum of 10,000*l.* and interest.

George Reid died in 1826, having appointed J. E. Hammet and Edward Oakeley (the Appellant), and William Oakeley, executors of his will, who duly proved the same; but, as they alleged, his assets were insufficient for the payment of his debts. Up to his death, the interest on the 10,000*l.* was paid by himself, and Kynaston, and afterwards Kynaston for some

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time continued the payment, until his affairs became embarrassed.

Sir Charles Oakeley, by indenture dated the 5th of September 1826, assigned (amongst other property) the said four bonds unto his sons, the Appellant and William Oakeley, and Thomas Hinckley, and shortly after the execution thereof, died, having by his will, duly made and executed, appointed his said sons and Thomas Hinckley executors thereof, who duly proved the same. In May 1827, Hinckley wrote a letter to Sir Simon H. Clarke, one of the representatives of P. C. Sherard, intimating that the trustees or executors of Sir Charles Oakeley had found amongst his papers the said four bonds, all interest whereon, it was by the said letter stated, had regularly been paid to that time, and that so long as the interest continued to be so paid, the trustees would not probably wish to call in the principal, but that, in consequence of the recent death of Mr. George Reid, they deemed it proper to apprise the representatives of P. C. Sherard of their liability. Kynaston ceased to pay the interest in 1828, and in January 1829, the Appellant and William Oakeley, and Thomas Hinckley, as assignees of the bonds, brought a state of facts and charge into the Master's office, under the decree, in the cause of *Sherard v. Sherard*, whereby they claimed the sum of 10,000*l.*, with interest thereon from the 1st of November 1828, as a debt due to them from the estate of P. C. Sherard, by virtue of the said four bonds. The proceedings upon this state of facts and charge were suspended to await the decision of the following suit.

In April 1829, Mrs. Pasheller and her husband, who is since dead, and Sir S. H. Clarke, exhibited their bill in Chancery against the said J. E. Hammet,

the Appellant, and William Oakeley, Thomas Hinckley and Roger Kynaston, which bill, after stating (amongst other things) to the purport or effect hereinbefore stated, prayed that it might be declared, that the estate of the said testator, P. C. Sherard, was discharged and exonerated from the payment of all sums of money due and to become due, or alleged to be due in respect of the said bonds, or either of them; and that the defendants, the Appellant, and William Oakeley, and Thomas Hinckley, might be restrained from taking any proceeding or proceedings, to obtain payment of the sums due or to become due, in respect of the four several bonds, or either of them, out of the assets of the said testator, and that, if necessary, the said bonds might be delivered up to the plaintiffs to be cancelled; or in case the Court should be of opinion that the estate of the testator, Sherard, was not so discharged, then that the said defendants, the Appellant and William Oakeley, and J. E. Hammet, as the executors of George Reid, and the defendant Roger Kynaston, might be decreed to take up and pay the said several bonds, or so much as might be due thereon, and to exonerate and indemnify the estate of P. C. Sherard from the payment thereof; and to pay to the plaintiffs what, if any thing, they might be compelled to pay out of the assets of P. C. Sherard, in respect of the said bonds, together with all costs, charges and expenses which had been or might be incurred by the plaintiffs in respect of the said bonds; and that it might in that case also be declared, that the plaintiffs had a lien upon the said policies of insurance, for indemnifying them against the said bonds; and that the same might, if necessary, be sold, and the proceeds applied in payment of what, if any thing, was due upon the said bonds, or

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to indemnify the plaintiffs against the bonds, and costs and expenses; or that the said policies, and the benefit of the indenture of the 17th of December 1823, might be assigned to them, and that they might be at liberty to commence such proceedings as they might be advised upon the covenants therein contained, against the estate of George Reid, and against Roger Kynaston, in the names of the Appellant, and William Oakeley, and Thomas Hinckley.

The several defendants appeared to the bill, and put in their answers, which being replied to, and the cause being at issue, the parties agreed upon admissions of several documents, letters and facts, to be considered and treated at the hearing as proved in the cause.

Among the documents so admitted and read, were the said articles of agreement, dated the 8th of June 1815, the said four several bonds, dated respectively the 12th July 1811; the said indenture of assignment of the policies of insurance, dated the 18th day of December 1823; the said other indenture of assignment of the bonds, dated the 5th September 1826, by Sir C. Oakeley, to the Appellant, and William Oakeley, and Thomas Hinckley; a copy of the said state of facts and charge carried into the Master's office on the 22d of January 1829, in *Sherard v. Sherard*; and an affidavit of the Appellant, and William Oakeley, and Thomas Hinckley, in support of such state of facts and charge.

Among the letters admitted and read at the hearing, were the extracts hereinbefore set forth, and also those which follow. A letter from Mr. Kynaston to Sir C. Oakeley, dated January 23d, 1821, contained this passage:—"At present it is quite impossible for us to fix the exact period when we may be able to


meet your bonds with perfect convenience, inasmuch as it must depend on a variety of circumstances, which cannot at this time be pronounced upon with certainty." This letter then refers to a recent shock which the writer's firm met with, and contains an application to Sir C. Oakeley for a loan. Sir Charles, in reply, wrote a letter, dated the 24th of January 1821, containing this passage:—"Under these circumstances, I cannot assist the concern in any other way than by allowing some further time for the payment of their bonds, under such an arrangement as must necessarily take place in the course of a few months." In another letter, dated February 13th, 1822, after consenting to renew an acceptance of a bill for 5,000*l.* at Mr. Kynaston's request, he expresses himself as follows:—"With respect to my own claims on the house, I shall not touch on them at present, but trust, as soon as Mr. Reid returns from Jamaica, this point will receive the earliest consideration, with a view to a settlement of the account."

In a letter, dated December 26th, 1822, Sir C. Oakeley writes to Mr. Kynaston, as follows:—"I am truly concerned to perceive, that the pecuniary difficulties of the house have not yet abated, and that from Mr. Wildman's failure and other untoward events, you are prevented, not only from taking any measures at present for the liquidation of my claims on the house, but that the pressure upon you still continues such, that you feel it necessary to request another renewal of my acceptance for a year. These circumstances, I confess, for reasons with which you are acquainted, create no small embarrassment in my own affairs. From the account you give of the disappointments and losses which the house has already experienced, and of the unpropitious state of West India

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concerns in general, I am led to apprehend disappointment myself, and that at a period of life when I shall be least capable of surmounting it; under this impression, I feel confident, however, that the house is fully disposed to secure me as far as their means will permit, and that if they see no very near prospect of reducing my claim, some assignment and stipulations like those which I received from Mr. Reid, may be granted for my satisfaction. Indeed, without something of this nature, I could not venture, in my present circumstances, to renew an acceptance which, though highly improbable, might by some possibility come upon me for payment." And in another letter to the same, dated January 1st, 1823, he writes thus:—"I never entertained a doubt of the ultimate security of my claims on the house; but from the account you gave me of the heavy loss sustained by Mr. Wildman's failure, and the depressed state of West India concerns in general, I saw little probability of your being able for some time to clear my account. I felt anxious, therefore, to obtain such a provision as might secure the gradual payment by instalments, and this



facilitate a settlement, which may correspond, as far as circumstances will permit, with the views I have already explained to you. I am sorry to learn from Edward (to whom you referred me for information respecting the affairs of the house), that your situation at present will not allow of any very early payment of my loans. Under these circumstances, it becomes indispensably necessary, on behalf of my family, that I should take the best security that the house can provide for me; and this caution, indeed, seemed so reasonable to yourself, that in your letter of the 29th December last, you observe, that 'you can have no objection to join in the assignment to me of any of the securities which the house possesses.' I learn from Edward, that you have policies of insurance to offer for 10,000 *l.*, which I am willing to take as a security for my first loan to that amount in 1811. For the other loan of 17,096*l.* 5*s.* 8*d.* three per cent. stock, I am willing to allow time for replacing this stock by annual instalments."

Several accounts were comprised in the admissions respectively headed and entitled "Debtor, Sir C. Oakeley, Bart., in account with George Reid & Co., creditor," and dated respectively the 1st of May 1812; 1st of May 1823; 30th of April 1814; 1st of May 1815; 1st of May 1816; 1st of May 1819; 1st of May 1824, and 30th of April 1825. These were accounts furnished by the house of Reid & Co. to Sir C. Oakeley, debiting him with the sums paid to his bankers from time to time, for interest on the 10,000*l.* bond debt, and the loan of stock made by him to the house, and giving him credit for the said 10,000*l.*, and for the further loan, and for the dividends and interest due on them.

The cause came to be heard upon the above evi-

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dence before Sir John Leach, Master of the Rolls, on the 13th of June 1832, when his Honor made a decree, whereby he declared that the estate of P. C. Sherard was discharged and exonerated from the payment of all sums of money due and to become due, or alleged to be due in respect of the said four several bonds, bearing date respectively the 12th of July 1811, or any or either of them, and that the Appellant and the said Thomas Hinckley should be restrained by the perpetual injunction of the Court from taking proceedings either at law or in equity, to obtain payment for the sums due or to become due in respect of the said four several bonds, or any or either of them, out of the assets of the said testator, P. C. Sherard. His Honor did not think fit to give costs on either side.

The Master of the Rolls, in pronouncing this decree, said it was not on the transactions of 1823, relating to the taking the assignment of the policies of insurance as a collateral security for payment of the bonds, that he came to the conclusion, that P. C. Sherard's estate was discharged, for he was of opinion, that if that estate was liable in the bonds up to 1823, it was not discharged by that transaction. But in 1817, Sir C. Oakeley enters into an agreement with the two partners, who had become, as between them and the executors of P. C. Sherard, the principal debtors on the bonds, and he agrees, as appears from the letters and accounts, to give them three years' time for payment of the demand. Indeed, he could not within the three years proceed against the principal debtors or the surety in respect of this demand; and if he could not proceed against either, the surety is relieved, and for this reason, because whatever he paid, he has a right to call on the principal debtor to repay him

What he so advanced. But if there be a delay for three years, he may be prejudiced by such delay, because in the meantime the solvent principal debtor may become insolvent, and so by the act of the creditor the surety would have lost his remedy against the principal debtor. The time granted to the principal debtor in this case in 1817, discharged the estate of Sherard. As however the executors were guilty of inattention, and were not aware of the circumstance by which their testator's estate was discharged from the payment of these bonds, though the Court was bound to give them relief from the consequences of Sir C. Oakeley's conduct, yet they were not entitled to costs.

Edward and William Oakeley appealed to the Lord Chancellor, who, by an order dated the 8th of March 1834, affirmed the decree.

Sir Simon H. Clarke and Mr. Pasheller died after the hearing of the decree, leaving Mrs. Pasheller the only personal representative of the said P. C. Sherard surviving, and to whom all interest in the matters of the suit survived.

William Oakeley also died, leaving the said Edward Oakeley and Thomas Hinckley, his co-executors, him surviving.

Edward Oakeley appealed to this House from the said decree and order affirming it. Before the appeal came to be heard, Mrs. Pasheller died, having by her will appointed her son Philip Castel Sherard, her executor, who proved the same, and, by an order of this House, dated the 11th of March 1836, the appeal was revived against him as a Respondent hereto, in place of Mrs. Pasheller.

Mr. Wakefield and Mr. Simmons for the Appellant :

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—The judgment of the Master of the Rolls was founded on the notion, that the estate of Philip Castel Sherard became, from June 1815, surety only for the debt, in consequence of the arrangement then entered into between his executors and the new partnership of Reid and Kynaston. Sir Charles Oakeley, the creditor, was not a party to that arrangement, nor is there any proof, nor even probability, that he knew any thing of it for several years after. The Appellant denied that he had notice of it.

[Lord *Lyndhurst* :—The judgment below assumes that Sir Charles Oakeley had notice of the arrangement, and that is alleged in the Respondent's case, but it is denied in the Appellant's.]

It is positively denied, and the Respondent, who alleges it, gives no proof to support the allegation. How could that arrangement affect the creditor, or alter the nature of his securities? It is necessary to consider the origin of the debt, in order to come to a just conclusion on this case. Sherard and Reid, in the year 1811, became jointly and severally bound to Sir Charles Oakeley for the principal sum of 10,000*l.*, as original and principal debtors, and not either of them as the surety of the other. The terms and form of the bonds made the debt of 10,000 *l.* the several debt of each of them, and Sherard, at the time of his death, was the several debtor of Sir Charles Oakeley in such sum of 10,000 *l.* By the express conditions of the bonds, it was contemplated that that sum should remain outstanding on the security thereof, after the partnership of Reid and Sherard, constituted by the articles of the 1st January 1810, should have determined: “ Now the condition of the above written bond, or obligation, is such, that if the above bounded

George Reid and Philip Castel Sherard, their heirs, executors or administrators, do and shall well and truly pay, or cause to be paid unto the said Sir Charles Oakeley, his executors or administrators, on or before the 15th day of January, which will be in the year 1818, all such sum and sums of money as he the said Sir Charles Oakeley, his executors or administrators, shall or may have paid in honour and discharge, or on account of the said bill of exchange so drawn upon and accepted by him as aforesaid," &c.

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Upon the death of Sherard, and before the bonds became payable, Reid and his new partner, by an agreement with Sherard's executors, took this debt upon themselves. The articles of agreement recited, among other things, that Reid should become entitled to all the outstanding debts and effects of the partnership with Sherard, (except as therein excepted,) upon paying a certain sum, and securing the payment of other sums therein mentioned, "and indemnifying the executors of Sherard from all outstanding debts and engagements of the said partnership, specified in the first schedule to the agreement." Then in the operative part of the articles, Reid and Kynaston covenanted to execute to the executors a bond for 150,000*l.*, conditioned for the payment of the outstanding debts specified in that first schedule, and for indemnifying the executors against all claims in respect thereof. Sir Charles Oakeley's debt of 10,000*l.* was specified in the first schedule; but although the covenant might have the effect of converting the liability of Sherard's estate into a surety as between his executors and Reid, it could not affect or change the rights of the creditor, who was no party to it. *Heath v. Percival* (a), *David v. Ellice* (b).

(a) 1 P. Wms. 682.

(b) 5 Barn. & Cress. 196.

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In these cases the creditor knew of, and assented to and acted upon a transfer of his debt by the original debtors, and yet they were not released. There was no binding agreement on Sir C. Oakeley not to sue on the bonds when they became payable. He could not have sued on them at the date of the agreement. If Sherard's executors meant to be released, they ought to have made Sir C. Oakeley a party to the agreement, and so obtained a release. The taking an indemnity from Reid and Kynaston amounted to an acknowledgement of a continuing liability of their testator's estate to the debts.

But it is alleged by the Respondent, and assumed in the judgment of the Master of the Rolls, that Sir C. Oakeley, in 1817, gave an indulgence of three years further time to Reid and Kynaston to pay the bonds, and that that act discharged the surety, inasmuch as he had not notice of the indulgence. Now, whether such indulgence was given at all, is mere matter of conjecture and inference from the accounts and from passages in Sir C. Oakeley's letters, which were written long subsequently to that period. But admitting that an extension of the time was granted to them, ought not the Court below to presume that it was granted on the same terms as in the assignment of the policies for further security in 1823, when the security of Sherard's estate was expressly reserved? The Master of the Rolls was clearly of opinion that Sherard's estate was not released by that transaction.

With respect to the receipt of interest from the new partners, there was nothing in that circumstance nor in the continuing to receive the accounts from them as before, that could operate as a discharge of the joint debtor's estate, when no act was done that would

show that the substituted credit of the new partnership was accepted instead of the first security: *Daniel v. Cross*(c), *Gough v. Davies*(d), *Kirwan v. Kirwan*(e). The interest was credited, and the accounts were transmitted in the same way after the bonds became payable, as they had been for the three years which elapsed from Sherard's death till they became payable.

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[Lord *Lyndhurst*:—With this exception, that a loan of 17,000*l.* stock to the new partnership, with the dividends, was blended in the accounts with the old debt of 10,000*l.*]

That blending of the accounts began in 1815, before the bonds became payable. The *items* were kept separate, not blended; and the whole of the accounts with Sir Charles Oakeley were, for the sake of convenience, put on one sheet and transmitted at the same time. There was nothing in the form of the accounts to apprise Sir C. Oakeley of a change of security, or to excite him to make inquiry. It was the duty of the executors of Mr. Sherard to inquire, whether this debt to which his estate was liable was discharged, and not to remain content with the covenant of indemnity from the new firm.

The decree below was founded on the error, that the deceased partner's estate became a surety only for this debt. It is not easy to comprehend how a joint and several obligor can become a surety for his own debt. Even if his estate was surety only, no act was done by the creditor to discharge it; he did not bind himself to give time—he only said, in a letter to one of the new firm, that he should be happy to wait a twelvemonth for the payment, a form of expression

(c) 3 Ves. jun. 277.

(d) 4 Price, 200.

(e) 4 Tyrw. 491.

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which would not be held to bind him in law or equity to give time. All the dealings between Sir Charles Oakeley and the new firm, left the former partner's executors in possession of all their rights and remedies against the new firm, and it was their own fault if their testator's estate suffered by their negligence.

Mr. *Pemberton* and Mr. *Jacob* for the Respondent:—Reid and Kynaston having, by the articles of June 1815, agreed with the representatives of Mr. Sherard to pay the 10,000 *l.*, and to indemnify his estate therefrom, and having, in the subsequent accounts and correspondence between themselves and Sir Charles Oakeley, adopted and assumed the debt, with his undoubted assent, the same became a debt from Reid and Kynaston to Sir Charles Oakeley. If the representatives of Mr. Sherard continued liable at all to the debt, by the effect of the said agreement of which Sir Charles Oakeley was aware, they stood, in respect of it, in the same relation to Reid and Kynaston, in which a surety stands to the principal debtor. Sir Charles Oakeley having, without their consent or privity, agreed to give time to Reid and Kynaston for payment of the debt, and having afterwards taken a further security from them, consenting, at their instance, and with the views disclosed by the correspondence, to conceal it from the representatives of Mr. Sherard, he thereby in equity discharged the estate of Sherard from any claim in respect of the debt.

The chief question was, what was the effect of that indulgence given by the creditor; whether it discharged the executors of Mr. Sherard, who, in consequence of the arrangement between them and the new

partners, stood in the character of sureties? The Appellant very well knew that his father was aware of the agreement of June 1815, whereby Reid and Kynaston took on themselves the payment of this debt, for he was clerk in the house, and Kynaston, in his letters to Sir C. Oakeley, referred to the Appellant for a full knowledge of the transactions of the firm. If he was not aware of the agreement of June 1815 when the bonds became payable, the Appellant was to state when he acquired that knowledge. Sir C. Oakeley's own letters in 1820, showed that, with perfect knowledge of the transaction, he had granted three years time to the firm for payment of the bonds. Had the executors of Mr. Sherard been aware that the bonds were an outstanding charge on his estate, they would have compelled Reid and Kynaston to pay off the debt. To prevent such a result, Sir C. Oakeley agreed not to communicate to Sherard's representatives his agreement with Reid and Kynaston to give them time. In fact, he all along looked to the new partners for the payment, and as one proof of his acquiescence, he adopted the accounts in which his loan of 17,000*l.* stock to them was blended with the former advance of 10,000*l.*

This case does not fall within the decisions that were cited for the Appellant. *David v. Ellice*, and *Gough v. Davies*, were commented on in *Thompson v. Percival* (*f*), which comes nearer to this case. Let us suppose the case of two merchants, one of whom owing the other 1,000*l.*, asks him how he wishes to be paid, and the other desires him to pay it in to his bankers. Both the merchants happen to bank with the same bankers, to whom the debtor goes and has 1,000*l.*

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(*f*) 5 Barn & Adol. 935; 3 Nev. & M. 167.

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transferred from his account to the creditor's account. Does not the debtor thereby discharge himself from that debt? The bankers thenceforward are liable to the creditor for so much money had and received to his account. Their own books would be conclusive evidence that they received the money for the creditor. So in the present case, the transfer is made by Reid and Kynaston from the account of Sherard's representatives to the credit of Sir C. Oakeley, who accepts the transfer, but instead of drawing out the money, leaves it with the new firm. The transaction is the same in effect as if the old firm had actually paid the 10,000*l.* to Sir C. Oakeley, and he desired it to be paid in to the new firm. He might have his action of *assumpsit* against the new firm, the consideration being that the money was handed over by the old to the new firm, and the evidence of the consideration being the letters and accounts stated. The debt would have ceased to be the debt of Reid and Sherard, and would become the debt of Reid and Kynaston.

[Lord *Lyndhurst*:—Can you cite any authority to the effect that two original principal debtors could, by arrangement among themselves, convert one into a surety only for the other principal debtor?]

The letters and accounts, and all the circumstances of this case, make it quite clear that Sir C. Oakeley accepted Reid and Kynaston as principal debtors, looking to Sherard's executors as sureties. These parties were not strictly and precisely in the relation of principal and surety, but they were treated on that footing by Sir C. Oakeley, whose acts would justify a court of equity to hold them in that relation. By the arrangement of 1815 a new debtor became bound, and that new security would be a consideration for

discharging the former debtor: *David v. Ellice* (g), *Thompson v. Percival* (h). The Appellant and Mr. Kynaston, both defendants in the cause, should explain, if they could, the dealings between Sir C. Oakeley and the new firm, so as to show that he was not bound by his acquiescence in the agreement of June 1815. We say, that by his recognition of that agreement, Sherard's estate was discharged; and that, at all events, it was discharged from all liability to him on the bonds, by his giving further time for payment, without the consent of the executors of Sherard. *Rees v. Berrington* (i).

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Lord *Lyndhurst*, having stated the facts of the case, 20 Aug. 1836. said, there was an arrangement between the new partner and Sir Charles Oakeley, by which the latter agreed to extend the time for payment for a period of three years. Now the principle of law is, that where a creditor gives time to the principal debtor, there being a surety to secure payment of the debt, and does so without consent of, or communication with, the surety, he discharges the surety from liability, as he thereby places him in a new situation, and exposes him to a risk and contingency to which he would not otherwise be liable. That being the fact in this case, I am of opinion that the representatives of Sherard were discharged from liability. That was the opinion of the late Master of the Rolls, and of the late Lord Chancellor. I think that, under the circumstances, they came to a correct decision. I shall, therefore, without further observation, move your Lordships that the judgment of the Court below be affirmed; and as the principle on which the Court

(g) 5 Barn. & C. 196. (h) Barn. & Adol. 935.
(i) 2 Ves. jun., 540.

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below proceeded was clear and distinct, and is perfectly well established, and as this is an appeal against two judgments, I move that the judgments be affirmed with costs.

The *Lord Chancellor*:—My Lords, as it was my fortune to be counsel for one of these parties in the Court of Chancery, I requested the assistance of my noble and learned friend in hearing this appeal; and I was desirous of abstaining from expressing any opinion upon this question until my noble and learned friend had delivered his judgment. I shall not now further enter into the case, than to say that I concur with him entirely in the conclusion at which he has arrived.

Judgment affirmed, with costs.

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APPEAL

FROM THE COURT OF SESSION.

DAVID PHILLIPS and WILLIAM PHILLIPS - *Appellants*.

DANIEL INNES - - - - - *Respondent*.

*Master and
 Apprentice.
 Observance of
 the Sabbath.
 Construction
 of Statutes.*

AN apprentice to a barber in Scotland, bound by his indentures "not to absent himself from his master's business on holiday or week-day, late hours or early, without leave," went away on Sundays without leave, and without shaving his master's customers.

Held by the Lords (reversing interlocutors of the Court of Session), that the apprentice could not be lawfully required to attend his master's shop on Sundays for the pur-

pose of shaving the customers, and that that work and all other sorts of handicraft were illegal, in England as well as in Scotland, not being works of necessity, or mercy, or charity.

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THIS cause commenced by the Respondent's presenting a petition to the magistrates of Dundee against the Appellants, on the 13th of May 1834, stating, among other things, that by an indenture, bearing date the 18th of March then last past, and executed by the petitioner on the one part, and by William Phillips, with consent of David Phillips, his father, and the said David Phillips as surety for his said son, on the other part, the said William Phillips, with such consent, became bound apprentice and servant to the petitioner in his trade and business of barber and hair-dresser, for the term of four years, from the 1st of July 1833, and during that space to serve the petitioner as a faithful and obedient apprentice, and "not to absent himself from his master's business, holiday or week-day, late hours or early, without leave first asked and obtained," under the penalty of 10*l.* sterling over and above performance: That from the nature of the petitioner's trade and business he required the attendance of his apprentice on the mornings of Sundays, as on other days, till at least ten o'clock, and accordingly the said apprentice did attend the petitioner's business on Sunday mornings regularly from the time of his entering into his service on the 1st of July 1833 until Sundays the 4th and the 11th of May then current (1834), on each of which he absented himself without leave as aforesaid, in consequence of which the petitioner suffered considerable loss and inconvenience, and he therefore prayed, among other things, a declaration that he,

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the petitioner, was entitled to the services of his said apprentice on the mornings of Sundays until 10 o'clock, and also to the penalty of 10 *l.* secured by the said indenture on failure of such service.

The Appellants answered the petition, and denied that the Respondent's business required the attendance of the Appellant, William Phillips, on the mornings of Sundays, and denied that he was bound to work for his master on Sundays, or that it was legal for any person to carry on his ordinary trade on the Sabbath. The Appellants relied on the Acts of the Scotch Parliament, 1503, c. 83; 1579, c. 70; 1592, c. 122; 1593, c. 159; 1594, c. 198; 1661, c. 18.; and 1690, c. 7, and other Acts, by which they alleged that all ordinary or every day's labour was expressly prohibited on Sundays. They also cited the case of *Learmonth v. Blackie*(a) (the 13th of February 1828), in which the Lord Justice Clerk held, that an apprentice being out on a Sunday was no breach of his indenture, as the master could not make him work on that day.

The magistrates of Dundee, after a due course of pleading, pronounced the following interlocutor: "13th of August 1834.—Having advised the minutes of debate, and whole process, find that it is matter of public notoriety, that, among the great body of mechanics, common labourers and seafaring men, residing in and frequenting this town and its port, a very considerable number are not in the use of shaving their beards with their own hands, but resort to barbers' shops in order to be shaved, many on the evenings of Saturday, but some on the mornings of Sunday: Find, that, however desirable it may be that the resorting to shaving-shops on the mornings of

(a) 6 Shaw & D. 533.

Sunday should be discontinued, if that could be effected without greater evil, yet it does not appear to be either necessary or expedient, for a due observance of the Sabbath, to forbid the existing usage so long as the shops continue, as at present, open early in the morning, and closed before the time fixed for the commencement of Divine service; for on no occasion have the authorities of the town seen any cause to regard the conduct of the barbers in their vocation, or the conduct of those resorting to their shops on the mornings of the Sundays, as other than decent and orderly, or as apt to give reasonable cause of offence to any man; and it appears very obvious that if working men, who are not themselves accustomed to shave, were forbidden the aid of the barbers in their shops on the Sunday mornings, many decently-disposed men would be prevented from frequenting places of worship, and from associating in a becoming manner with their families and friends through want of personal cleanness; and the attempt to reduce the minor evil might lead to some more serious: Find, therefore, that in so far as the defender, the apprentice, is called upon to aid his master in shaving his customers on the mornings of Sunday, before ten o'clock, it is not contrary to the spirit of the statutes regarding the Sabbath, nor contrary to the recognised usages under them, that the apprentice should give such aid: But find that the apprentice is not bound, nor is it lawful for him to work in the making of wigs, or in similar employment not immediately necessary for the day; and with this explanation, ordain the defender, the apprentice, to aid his master on the mornings of Sunday, when his master has occasion for his services in shaving his customers, the work not continuing after ten o'clock in the morning," &c.

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The Appellants complained of this interlocutor by reclaiming petition, upon which the said magistrates pronounced the following interlocutor: "Dundee, 20th August 1834.—Having advised the reclaiming petition for the defenders, and whole process, find it admitted by the defenders that the apprentice entered the pursuer's service on the 1st day of July 1833, and that he attended at the pursuer's shop, and did what was required of him on the morning of every Sunday from that date until the 4th day of May last, being for a period of ten months: Find also, that it was not until the 18th of March last, that is to say, after an experience of more than eight months, that the indenture was entered into, and by it the apprentice, with his father's consent, became bound not to absent himself from his master's service, 'holiday or week-day:' Find, therefore, that it is now too late for the apprentice, and his father and cautioner, to allege, that, though not contrary to law, the service on the mornings of Sundays is not according to their own sentiments, and on that ground to seek to be relieved of their civil engagement so deliberately made; and with this explanation, adheres to the interlocutor of 13th August current."

These interlocutors having been brought under review of the Court of Session by advocacy, and the cause having come before Lord Jeffrey, as Lord Ordinary, he, after hearing the arguments of counsel, on the 14th of March 1835, reversed the above interlocutors of the magistrates. He added to his judgment a note to this effect: "This is the first instance in which a court of law has directly and positively ordained a handicraftsman, without any pretence of necessity or serious urgency, to work at his handicraft on a Sunday." "The cases of apothecaries' shops

being open, and of Sunday travelling, and other cases that were cited in the argument, are quite inapplicable. These exceptions have been admitted on the ground that they may frequently be requisite for purposes of *necessity* and *mercy*, and that it would be impracticable to investigate cases of occasional abuse. But it is ridiculous to speak of a public shaving-shop as an establishment of such necessity as not to admit of interruption for a single day in the week. If the advocator had refused to shave the head of a lunatic, or one whose skull had been fractured, the cases would have been parallel." "As to the alleged contract of the parties, the words are ambiguous. If *holidays* meant *Sundays*, then the contract must have meant that the apprentice should serve on Sundays exactly as he did on week-days, and that there should be no distinction between them. Yet the master admits that he could not require him to work, even at shaving, during Divine service, nor at wig-making even on the Sunday morning. If he says he should only work when consistent with law and decency, then the Lord Ordinary is of opinion that he should not work on that day at all."

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This interlocutor was submitted to the review of the Lords of the Second Division of the Court of Session, who, after hearing counsel, pronounced the following interlocutor: "19 May 1835.—The Lords having considered this note, with the other proceedings, and heard counsel thereon, alter the interlocutor of the Lord Ordinary; remit simpliciter to the magistrates of Dundee."

The appeal was from this last interlocutor, and from a subsequent one confirming it, and also from the above stated interlocutors of the magistrates of

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Dr. *Lushington*, for the Appellants, cited the ancient Scotch Acts before-mentioned respecting the observance of the Sabbath, and insisted that they prohibited all ordinary labour and handicraft on Sundays, except such as were of "necessity or mercy," and that shaving the customers of the Respondent did not fall within that exception. He also referred to Baron Hume's Commentaries on the Criminal Law, vol. 1, p. 522, where he says, "To secure the due observance of the Lord's day, we have a long succession of statutes, most of them passed after the Reformation, which prohibited the holding of fairs and markets, all buying and selling, working, gaming or playing, resort to ale-houses or taverns, salmon fishing, going of salt-pans, mills or kilns, hiring of reapers, and *in general, all use of ordinary labour, employment or sport on that day.*"

In the interpretation of the statutes, there would seem to be little room for doubt. The exercise of handicrafts is specially prohibited. Can it be doubted that shaving is a handicraft? It is not only a handicraft, but one requiring great skill in the operator. It is an art of hand, and requires skill and dexterity of hand. A barber has instruments, as others have, who labour with the hand, and though the subject upon which his craft is exercised may be different, the mode of its exercise is precisely or nearly similar. If we look from the letter of the statutes to their spirit, still less doubt, if possible, can be entertained as to their meaning and effect. If we look, above all, to the Statute of 1690, which sets forth the nature of those avocations which alone are proper for Sunday, can we conceive it for a moment to have been within the contemplation of those by whom it was framed

and sanctioned (a), that shops should be open during any part of that holy day for the exercise of any such trade? The duties of necessity and mercy, which are mentioned in that Act, are of a very different class and description from the acts sought here to be enforced. The Appellant does not seek to be relieved from a contract, merely because it is contrary to conscience. He denies the contract, disputes its legality, and maintains his freedom from the alleged engagement, because no illegal compact can be enforced. The alleged obligation to serve on holidays, is wholly misinterpreted. These days are not the Sabbaths, but those *dies feriati*, which usage has set apart for the enjoyment of the lower classes. As the Lord Ordinary has remarked, Sundays cannot mean *holidays*, because then it must be meant that the apprentice must serve on Sundays exactly as on other days, an interpretation irreconcilable with law or reason. But assuming that the construction, which it is sought to attach to the use of the phrase, were correct, it is submitted that the obligation, if illegal, can receive no effect or force in judgment. If the thing stipulated for is in itself contrary to law, the paction by which the execution of the illegal act is stipulated, must be held as intrinsically null: *Pactis privatorum juri publico non derogatur*. It is impossible to compel one who is unwilling to disobey the law to contravene it. He is entitled to plead freedom from a compact into which he should never have entered, and to be protected in maintaining an obedience to the law, which the law would of itself have interposed to enforce, had the act come otherwise within its cognisance.

It is immaterial to inquire into the alleged fact, as to the Appellant having proceeded during a short

(a) See note, next page.

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time in doing the act which is alleged to be illegal. If tainted by illegality, the prior performance of the act can afford no good ground why the illegal act should be repeated. It is praiseworthy to stay a course of illegal acting at any time.

No counsel appeared for the Respondent, nor had he lodged any answer to the appeal, though peremptorily ordered to do so.

The case was adjourned for consideration.

20 Feb.

The *Lord Chancellor* this day moved the judgment. This is a case of great importance, regarding the observance of the Sabbath (his Lordship stated the indenture and the alleged breach of it, and the proceedings before the magistrates of Dundee). Lord Jeffrey, before whom the case came as Lord Ordinary, thought that the opinion of the magistrates was not well founded, and he accordingly reversed their decision; but the case coming afterwards before the Lords of the Second Division of the Court of Session, three of them, against the Lord Justice Clerk, thought the decision of the magistrates was not contrary to the statute law of Scotland, and they affirmed it, reversing the Lord Ordinary's interlocutor. It becomes the duty of this House now, to decide which of those opinions is right, and for that purpose it is necessary to refer to the Acts of Parliament passed in Scotland for securing the observance of the Sabbath. By the statute of 1579, c. 70, it was enacted, among other things, that "no handy-labouring or working be used on the Sunday." The same prohibition was enacted by the statute of 1690, c. 7, which added to the private and public exercise of worship, "the duties of necessity or mercy (*b*).¹" These words were said

(*b*) Sect. 8, of cap. 21, of the Westminster Confession of Faith, which was adopted and confirmed by that Act.

to qualify the generality of the Act of 1579. The English Act on this subject, 29 Car. 2, c. 7, contained the like prohibition of work on Sunday, "works of necessity and charity only excepted."

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The question for your Lordships' consideration is, whether the work required by the Respondent to be done, comes within the duties of necessity or mercy, and whether there is any ground of reason, or authority of law, for the work of shaving a barber's customers up to 10 o'clock on Sunday; for the Court of Session held that a contract to work generally on Sundays could not be enforced. The only authority upon this subject, and that bearing only indirectly on it, is the case of *Learmonth v. Blackie*, decided on the 13th of February 1828, by the Lord Justice Clerk, who there said, that "the boy's (the apprentice) being out on the Sunday was no breach of indenture, as the master could not make him work on that day (c)," and that learned Judge adhered to that opinion in the present case.

An attempt was made in the pleadings, as appears from the printed case, to raise a doubt as to the meaning of "holiday" in the indenture, in contradistinction to "week-day." Now if the word "holiday" did not mean Sundays, but other days directed to be kept as holidays in Scotland, then the contract in the indenture would be, that the apprentice should work upon such holidays as on other days, and on that interpretation of the words he could not be held bound by the contract to work on Sundays. But if, on the other hand, the word "holiday," put in contradistinction with "week-day," be taken to refer to Sundays, then the contract would be to work on Sundays, to which the objection would be, that the

(c) 6 Shaw & D. 536.

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law of Scotland prohibited all work on Sunday, except such as fell within the description of "the duties of necessity or mercy." If the act in question be held to come within the exception in the law of Scotland, as to the observance of the Sabbath, it is impossible to say where the exceptions will stop. This work is not a work of necessity, nor is it a work of mercy, it is one of mere convenience ; and if your Lordships were to act upon this case as a precedent for other cases, founded upon no more than convenience, your Lordships would, I apprehend, be laying down a rule, by which the law of Scotland prohibiting persons from carrying on their ordinary business on Sundays, would be repealed, or rendered useless. I do not find any ground of reason or authority in support of the interlocutor of the three Judges of the Second Division, and I coincide in the opinions of the Lord Justice Clerk and Lord Jeffrey ; and I therefore submit to your Lordships, that the interlocutors complained of cannot be supported, and that the master cannot call upon his apprentice to work on any part of the Sunday.

Lord *Wynford* concurred in the opinion expressed by the Lord Chancellor. Their Lordships' duty was to decide, not what was convenient in practice, but what the law declared. The laws of Scotland referred to in this case, prohibited all work on Sundays, except "works of necessity or mercy." The act of shaving the Respondent's customers did not fall within the exception ; it was not necessary that people should be shaved on Sunday in a public shop ; it was not an act of mercy, it was clearly an act of handicraft. Baron Hume, in his Commentaries (*d*) on the Crimi-

(*d*) 1 Vol. 552.

nal Law of Scotland, put the true construction on these statutes, when he said that they prohibited, in general, all use of ordinary labour on Sunday. This interlocutor ought to be reversed.

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Lord *Brougham* said he also agreed that the interlocutor appealed from must be reversed; but as no one appeared to represent the Respondent, his Lordship thought it necessary to state his reasons for his opinion. The question in the Court below was, whether the work of shaving on Sundays came within the exception in the statute of 1690? Clearly this was not a work of "necessity or mercy," or of "charity," which last was the word of exception in the corresponding English statute. The object of the Respondent was gain; and he whose object was gain, did not come within the exception. The necessity contemplated by the exception in the statute, was the necessity of the person who worked, and not of him who compelled the work.

It was said in the Court below, that unless working persons, who do not themselves shave their beards, were allowed to resort to the barbers' shops on Sundays, many decently disposed men would be prevented from frequenting places of worship, and from associating with their families or friends, from want of personal cleanliness. But why should they not do the work on Saturday, as the people did in Glasgow, and in other towns, where no sort of work was allowed to be done on the Sunday? It might be as well said that because a person could not decently resort to church, or associate with his family, unless he was decently clothed and fed, therefore the tailor's, and the butcher's, and the baker's shops should be kept open on Sunday morning for the convenience of such persons.

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That was not the practice; the parties took good care to provide themselves on the Saturdays with food and clothing.

The cases of accident mentioned in the Court below, such as the case of a person falling down or receiving a contusion or other wound in the head, on Sunday, or the seizing of a madman after breaking loose from the asylum, did not apply here, for the taking the one to the apothecary's shop, and the other back to the asylum, would not be illegal, but would come within the exception in the statutes, both of Scotland and England. Would such acts be at all similar to the keeping open shop for all who should choose to come on the Sunday, whether the operation might or might not admit of delay till Monday, or might or might not have been performed on the Saturday evening? Such an operation and the cases referred to, were by no means similar. Gain, in fact, was the object of the master; and such work, being for hire merely, could not come within the description of "duties of necessity or mercy."

With respect to the meaning of the word "holiday," he agreed with his noble and learned friend the Lord Chancellor, that that word did not mean Sunday, but he was clearly of opinion that it meant fast-days and saints' days. If it meant Sundays, then the apprentice had bound himself to work on Sundays as on week-days, without distinction as to the hours of labour. But the magistrates of Dundee, and the Court of Session did make that distinction, for they said that the apprentice was bound to work up to 10 o'clock only on Sunday—rather making an Act of Parliament than construing an Act—and that he was not bound to work at wig-making at all on that day.

Interlocutors reversed, and cause remitted.

A P P E A L

FROM THE COURT OF EXCHEQUER.

1837.

Monday,
13 March.GEORGE BROOKE and Others - - - *Appellants.*LOUISA CHAMPERNOWNE and Others - *Respondents.*

It seems that where the Order of an Appeal Committee is desired to be re-heard, the re-hearing cannot in strictness take place without notice.

*Appeals.
Practice.*

Though a party may for convenience sake be allowed to argue against the decision of an Appeal Committee without having given such notice, it must be on the understanding that he is to present a petition to be heard against the allowance of the petition of appeal.

The time limited by the Standing Order 24 March 1726, for the presenting of petitions of appeal, begins to run from the enrolment of a decree of a Court of Equity, and not from the period when that decree was pronounced.

The enrolment does not relate backwards so as to prevent, by the effect of relation, this construction of the Standing Order.

Where, therefore, a decree which had been pronounced in 1821 was not enrolled till 1836, the Appeal Committee received the petition of appeal, and the House confirmed its decision.

WHEN this case was called on, Sir *W. Follett*, who appeared for the Respondents, took a preliminary objection. He submitted that the appeal was out of time, according to the Standing Orders of the House.

Mr. *Pemberton* (with whom were Mr. *Swanston* and Mr. *Lynch*) *contra*. This question has been decided by the Appeal Committee, after argument by

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the Solicitors on both sides, and after consideration of the cases cited. The proper course is to petition that Committee that the order allowing the appeal may be dismissed.

The officer of the House read the order of the Appeal Committee allowing the petition of appeal.

The *Lord Chancellor* :—It appears by the minutes, that that order has been confirmed in the usual manner by the House.

Lord *Wynford* :—If you desire the order of the Appeal Committee to be re-heard, that cannot be done without notice.

Sir *W. Follett* :—This objection is stated in the first reason in the Respondent's case.

The *Lord Chancellor* :—Does not the time limited by the Standing Order begin to run from the period of enrolment only?

Sir *W. Follett* :—In this case, which comes from the Court of Exchequer, it does not. That Court is a court of record, and is within the 10 & 11 Will. 3. c. 14.

Lord *Brougham* :—Not on the equity side.

Sir *W. Follett* :—There are two cases in the English and the Irish Houses of Lords, holding that the time runs from the period of the decree pronounced, and that there is a relation back from the enrolment to that period, *Smythe v. Clay* (a), and *Hearne v. Briscoe* (b).

(a) 1 Brown's P. C. 453. (b) 1 Ridgway's Ir. Parl. Cas. 359.

In the first of these cases the statute of 10 and 11 Will. 3, c. 14, regulating the time for bringing writs of error, and the Standing Order of the House regulating the time for bringing appeals, were assimilated to each other.

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The *Lord Chancellor*:—This is a question of importance. Though in point of form you appear not to raise the objection in the case, yet in fact this is an appeal against an order of an Appeal Committee confirmed by the House, and consequently against the Order of the House. In Chancery, objections of this sort could not be heard without the Court giving the parties the opportunity of applying; so, if you argue it now, which you may do for convenience' sake, it must be on the understanding that you present a petition to be heard against the allowance of the petition of appeal.

Sir *W. Follett* assented, and then proceeded with the argument. The bill in this case was filed in Michaelmas Term 1817. The decree was pronounced in February 1821. From that decree an appeal now comes on for hearing before this House. Exceptions were taken to the Master's report and argued. An order was made and a petition to re-hear the cause was presented. That petition was dismissed as being out of time. Not being in time for a re-hearing they did not then appeal, but presented a petition to Lord Lyndhurst, at that time Lord Chief Baron, to alter the terms of the decree. His Lordship made an order on the 9th of July 1831. An appeal was presented to this House against that order, and the House dismissed the order, upon the ground that the Lord Chief Baron had no power upon petition to make an order to alter the terms of a decree (c). At the time the order was made, the

(c) See *Champernowne v. Brooke*, ante, vol. 3, p. 4.

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decree had not been enrolled. After that time the Appellants took steps to enrol it. The decree had been made in 1821, before the late statute was passed, and when the whole Court of Exchequer sat to decide causes in equity. What was the course they adopted? They got Lord Abinger to sign this paper as a decree. They then took it in as a decree, and got it enrolled as of Hilary Term 1836. But Lord Abinger was not a Judge of the Court at the time that the decree was really made. After that, this appeal was brought against the decree. The question is, whether, in 1836, they can appeal against a decree which was made in 1821. The objection does not come on them by surprise. The rule of this House is, that no petition of appeal shall be allowed against the decree of any Court of Equity, five years after the decree has been pronounced (*d*). To allow this appeal will be to

(*d*) That no petition of appeal from any decree, or sentence of any Court of Equity in England or Ireland, or of any court in Scotland, before this time signed and enrolled or extracted, shall be received by this House after five years, to be accounted from the expiration of this present Session of Parliament, and the end of the next Session ensuing the said five years; nor shall any petition of appeal from any decree or sentence of any of the said Courts, to be hereafter signed and enrolled or extracted, be received by this House after five years from the signing and enrolling or extracting of such decree or sentence, and the end of the next Session ensuing the said five years, unless the person entitled to such appeal be within the age of 21 years, or covert, *non compos mentis*, imprisoned, or out of Great Britain or Ireland; in which case such person shall and may be at liberty to bring his appeal for reversing any such decree or sentence, at any time within five years next after his full age, discovery, coming of sound mind, enlargement out of prison, or coming into Great Britain or Ireland, and the end of the next Session of Parliament ensuing the said five years; but not afterwards or otherwise.—Order, 24 March 1725, *Bridg. Prac. Dig.* 48.

This is in vol. 22, Lords' Journals, p. 622, and appears to be moved on the 24th of March 1726. Lord Lechmere dissented from it, and on the motion that it be made a Standing Order, the debate was adjourned to the next day, when an adjournment was again moved, but negatived, and the Order was agreed to. Vol. 22,

render that rule nugatory. The enrolling of the decree within these last five years will not get rid of the objection; for if it would, a decree pronounced 20 or 50 or 200 years ago, might be now enrolled for the purpose of being made the subject of an appeal. The object of the rule is, that the decree should be enrolled at once. Suppose this was a question of signing judgment in a Court of Law. The act of signing judgment is a completion of the proceedings. The pronouncing of the decree is so here. The question is, what is the meaning, in the words of the order, of "after five years from the signing and enrolling or extracting the decree"? Do they mean that the period mentioned may be calculated from any moment when the form of enrolment takes place? What is the effect of an enrolment made long after the decree has been pronounced? Does the enrolment make it a decree of the Court, or is it not entitled to that character from the moment of its being pronounced? In the Courts of Common Law, a judgment of Hilary Term is so called, because it was pronounced in that term; and whether the parties proceed or not to take advantage of the judgment in that term, it still retains that character.—[Lord *Wynford*: Is the record of a judgment ever completed, except when it is necessary to be so, with a view to further proceedings?—Seldom, if ever. In strictness, a judgment, not signed, would not affect lands; to do which it must be docketted and indexed under the statute of Cha. II., (e), but that would not prevent its having all the other effects of a judgment. The decree in this case has been acted on.—[The *Lord*

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Journals, p. 634. The Order, as given in *Bridg. Prac. Dig.*, is incorrectly copied. The form above given is in the terms used in the Journals.

(e) 29 Ch. 2. c. 3.

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Chancellor: There is a case of *Pulteney v. Darlington*, in the Lords' Journals of 1792 (*f*), where this very question was considered.]—In *Dobson v. Oliver* (*g*), it is stated that it is not the practice to enrol decrees in the Court of Exchequer.—[Lord *Brougham*: What is the meaning of that? Does it mean that it is not ordinarily, or that it is never done?—That does not appear. The expression is “in the Exchequer, all the enrolment there is the entry.” Here the decree was perfect in 1821. The title to the estate had been fully investigated, and the Master had no authority to investigate it but under the decree. Now, as to the cases: In *Pulteney v. Darlington* it does not appear that there was any petition to dismiss the appeal on the ground of the delay. The objection was taken by some of the Lords. That case, therefore, cannot be considered as a decisive authority. The next case is that of *Smythe v. Clay* (*h*); there the appeal was brought in 1769, upon two decrees of the 15th July 1728, and the 5th of February 1731; they were enrolled in March 1764. The House declared that the appeal ought not to have been received, and accordingly it was dismissed.—[Lord *Brougham*: How can

(*f*) 39 Journ. H. L., p. 275. It was an appeal brought in February 1792, against two orders of the Court of Chancery of the 17th June 1775, and 24th March 1783. The petition of appeal was ordered to be referred to the Appeal Committee “to consider whether the same be properly brought according to the Standing Orders relative to appeals.” This reference was made on the 13th of February. On the 15th the Appeal Committee reported (39 Journ. H. L. 281), “That having examined the orders complained of in the said appeal, the last of which was made on the 24th of March 1783, and it appearing by the date of the docket for the enrolment thereof that the same was not signed by the Lord High Chancellor until the 3d August 1786, and having considered the Standing Order, No. 118, relative to the time limited for bringing in appeals, it appears to the Committee that the said appeal is properly brought.” The appeal was afterwards heard, Lord Thurlow being Chancellor.

(*g*) Bunb. 160.

(*h*) 1 Bro. P. C. 453.

you reconcile that with *Pulteney v. Darlington*?—Lord *Wynford*: And the report of the Committee in the latter case was confirmed by the House.]—That is, it was confirmed in the ordinary way without argument. If the decisions are conflicting, that is to be preferred which was argued at this Bar, rather than that of the grounds of the decision, of which nothing is known.—[Lord *Brougham*: But Lord Thurlow was present when the report of the Committee was confirmed.]—Here, too, the party has acted on the decree, and it would be inconvenient to allow him to do that, and yet, years afterwards, to enrol it for the purpose of appealing against it. There is a case of *Hearne v. Briscoe* (*i*), which depended on a Standing Order of the Irish House of Lords (*k*), very nearly the same in terms as the Order of this House. The petition of appeal there was lodged on the 23d of November 1786; the Order appealed against was pronounced in the Court of Exchequer in Ireland on the 7th of February 1774. The Respondent's petition to dismiss the appeal was on the 21st of February 1787, and the appeal was dismissed on account of the delay.—[The *Lord Chancellor*: No question appears to have been raised there as to whether the Order was enrolled

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(*i*) 1 Ridg. Ir. Parl. Cas. 359.

(*k*) 95 Standing Order, 1 Ridg. xxvii. 5 Journ. Irish H. L., 436.
“No petition of appeal from any decree, order or sentence of the said Courts to be received after five years from the signing and enrolling or extracting the same, and the end of 14 days next ensuing the said five years, unless the person entitled to such appeal be within the age of 21 years, or covert, *non compos mentis*, imprisoned, or out of Great Britain or Ireland. In which cases such person shall and may be at liberty to bring his appeal for reversing any such decree or sentence, at any time within five years next after his full age, discoveriture, coming of sound mind, enlargement out of prison, or coming into Great Britain or Ireland, and 14 days to be accounted from and after the first day of the Session or meeting of Parliament next ensuing the said five years, but not afterwards or otherwise.”

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or not.]—There was none ; but the case shows that the Irish House of Lords considered that the date of the decree being pronounced was the date at which the limitation began to run. As to the practice of the Court of Exchequer, it does not seem that enrolment is at all necessary ; but one of the Judges, who pronounces the decree, signs it.—[The *Lord Chancellor*: When a question is decided at the Rolls, if the order is not enrolled ; the case may be re-heard there or before the Lord Chancellor. When it is enrolled, the Court of Chancery ceases to have jurisdiction over it.] In Chancery the enrolment prevents a re-hearing, but in the Court of Exchequer the enrolment is not necessary for that purpose. It is impossible to distinguish this case from *Smythe v. Clay* (1), and unless that case is overruled this appeal must be dismissed.

Mr. *Wakefield* was on the same side.

The *Lord Chancellor*:—The question on this preliminary objection is, in fact, one which has been considered before the Committee of Appeals, and the Committee came to the conclusion that the party now appealing is not precluded from doing so by the length of time which has elapsed since the decree was pronounced, as the appeal was presented within the limited period of time, dated from the enrolment. What are the words of the Standing Order ? (His Lordship read them : see *ante*, p. 250.) In the case of *Smythe v. Clay*, there was a proceeding which is not easily to be accounted for. The petition of appeal had been received. There were, however, several objections made: the first was, that above 20 years had elapsed since the decree was originally pronounced, and that the House ought, with regard to

(1) 1 Brown, P. C. 453.

suits in Equity, to act upon the principles adopted in the common law Courts upon common law cases, under the provisions of the statute 10 Will. 3, c. 14. The second objection was, that the Standing Order of the House, limiting the time of appeal to five years after enrolment, was not intended to leave it open to any person to appeal from an ancient decree, merely because it happened to be enrolled within five years from the time of presenting the appeal. The first of these objections it was open to the parties to make on the hearing, with a view to show that the appeal ought to be dismissed on the merits. The second was purely a question of time, according to the practice of the House. It was decided that the case should not be heard, from which I infer, not that the appeal was declared to be wrong, but that it could not be heard on account of the lapse of time. That is one decision; but in 1792, the subject was referred to a committee (a standing committee was not then appointed), which committee made its report to the House. The question was the same as in the previous case: both parties attended. The matter was certainly one of great importance. The Committee there said, that the appeal was brought within the time, and the time was to be considered as running, not from the pronouncing of the decree, but from the time of the enrolment. These two cases were brought before the notice of the Appeal Committee here. It was said that great evils might arise from allowing parties to let decrees be so long without enrolment, and then permitting them to found appeals on such decrees when enrolled. My answer is, that that may be prevented by the party in whose favour the decree is made, at once enrolling it. The time would begin to run from the enrolment, and the parties would be con-

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cluded. Inconvenience may certainly arise in some cases from allowing a party to enrol the decree *nunc pro tunc*, but on the other hand, it is clear that so enrolling the decree cannot alter the real date of the decree. I do not know what the practice of the Court of Exchequer is, but there must be some proceeding of a similar kind there, something which is equivalent to enrolling a decree in the Court of Chancery. The point in the present case is, that though the period limited has elapsed from the time of the decree pronounced, it has not elapsed from the time when the decree was enrolled, and consequently not from that when the limitation began to take effect. It seems to me, that this argument is well founded; that it is in strict conformity with the words of the order, which are "signed *and* enrolled;" that it is also in conformity with the case of *Pulteney v. Darlington*, and that there is no good ground to prevent your Lordships from hearing the present appeal. I do not regret this argument at the bar, but it is, properly speaking, irregular to hear an argument at the bar on what has already been decided in the Committee of Appeals.

Lord Brougham:—I entirely agree with the opinion of the Lord Chancellor. It would require a strong case on a preliminary objection, to induce me to alter the decision of the Committee of Appeals. *Smythe v. Clay*, and *Pulteney v. Darlington*, appear to have been considered in the Committee. They were cited and commented on, and the Committee adhered to the latter case. The Committee either thought that the two cases were reconcileable, or that in *Pulteney v. Darlington* the sounder view was taken of the construction of the Standing Order. In that case

certainly, Lord Thurlow being present, the House confirmed the view of the Appeal Committee. Then comes this case—which may be considered a second order of an Appeal Committee adjudicating the point—to set down the present case for a hearing. I do not say, that it would not be possible to make the House dismiss the appeal, and set aside these two decisions of the Committee, but it would require a strong case for that purpose. I agree with what has been said as to the construction of the Standing Order, namely, that it must be construed “signed *and* enrolled.” If it merely meant pronounced, these words would not have been introduced. A party may enrol a decree at once. If he chooses to take one step in the Exchequer, he may do that which is the same as making an enrolment in Chancery. From the period of that step being taken, the years limited would begin to run, and he would have the protection of the Standing Order against a long delayed appeal.

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Lord *Wynford*:—The case of *Smythe v. Clay* would have been an authority to shut out the jurisdiction of your Lordships, but that case was subsequently considered in *Pulteney v. Darlington*, and from the latter case it appears that the time begins to run from the period of the enrolment. A later authority is, generally speaking, more binding than an earlier one; but besides that circumstance, *Smythe v. Clay* was considered in the Appeal Committee here, Lord Lyndhurst being present, who must of course be familiar with the practice of the Court of Exchequer. It is in the power of either party to prevent inconveniences from arising from the want of enrolment. The party who possesses the decree may enrol it, and the other will not be able to keep the

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time from running. I therefore think we must hear this appeal, but I am bound to add, that from the lapse of time it will require a stronger case to get rid of the decree made in 1821, than if it had been appealed against at once. By hearing the appeal, we are not precluded from giving full weight to the objection arising from the length of time which has been suffered to elapse between the decree and the appeal.

Preliminary Objection overruled.

Mar. 17 & 18,
1836.
July 14, 1837.

APPEAL

FROM THE COURT OF CHANCERY.

SAMUEL WALKER, JONATHAN WALKER,
VINCENT HENRY EYRE, and RICHARD
STANLEY - - - - - } *Appellants.*

JOHN HARDMAN, THOMAS COOKE, WIL-
LIAM BAKER and SOPHIA his Wife, and
CHARLES BAYLIS and ANN his Wife - } *Respondents.*

*Bond, Con-
struction of.
Principal.
Surety.*

Where a bond, which, on the face of it, appears to be a simple money bond, is given to secure a sum certain with interest, it must be construed, so far at least as regards the surety, as given to secure the debt then existing, and not to cover floating balances.

The conduct of the principals, creditor and debtor, with respect to such a bond, will not affect the rights and liabilities of an innocent surety, who has not authorized their dealing with the bond in a particular manner.

The fact that a bond is payable on demand, and that interest is payable from the date of the bond, is a circumstance to show that it is a simple money bond, and not a bond to secure floating balances.

IN the month of August 1815, and for some time before and afterwards, Henry Lomas, Edward Getley,

and Thomas Fidgeon, carried on business at Sheffield, in the county of York, in partnership, under the firm of Henry Lomas & Co. Thomas Walker, since deceased, and the Appellants, carried on business during the same period at Sheffield, as bankers, in partnership, under the firm of Walkers, Eyre & Stanley. Lomas & Co. kept a banking account with Walkers & Co., and became, and were, from time to time, considerably indebted to that house, upon the balance of such account. Messrs. Walkers & Co. having, in August 1815, required security from Henry Lomas & Co. for the balance due from them, it was agreed that a bond for 10,000 *l.* should be given to the bankers by the three partners in the firm of Henry Lomas & Co., and a surety. William Fidgeon, a farmer and land-owner, residing at Wilnecote, in the county of Warwick, the brother of Thomas Fidgeon, was induced to become surety for Lomas & Co. in the bond to Messrs. Walkers.

The following bond was accordingly executed :—

“ Know all men by these presents, that we, Thomas Fidgeon, Edward Getley, and Henry Lomas, merchants, and William Fidgeon, of Wilnecote, in the county of Warwick, farmer, are jointly and severally held, and firmly bound to Thomas Walker, Samuel Walker, Jonathan Walker, Vincent Eyre, and Richard Stanley, bankers and partners, in the sum of 20,000*l.* of good and lawful English money, to be paid to them, or any of them, or their certain attorney, their executors, administrators, or assigns ; for which payment to be well and faithfully made, we bind ourselves jointly and severally, and each and every of us by himself, for the whole and every part thereof, our and each and every of our heirs, executors, and admi-

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nistrators, and every of them, firmly by these presents. Sealed and dated 26th August 1815."

"The condition of this obligation is such, that if the abovebound Thomas Fidgeon, Edward Getley, Henry Lomas, and William Fidgeon, or some or one of them, their or some or one of their heirs, executors, or administrators, or any of them, shall and do well and truly pay, or cause to be paid unto the above-named Thomas Walker, Samuel Walker, Jonathan Walker, Vincent Eyre, and Richard Stanley, or any of them, their executors, administrators, or assigns, the full sum of 10,000 *l.*, of lawful money of the United Kingdom of Great Britain and Ireland, current in England, upon demand, together with full lawful interest for the same, from the date hereof, of like lawful money, without any deduction or abatement whatsoever (except for the property-tax, as required by law), and without fraud or further delay, then this obligation to be void and of none effect, or else to remain in full force and virtue."

After this bond was given, the banking account between Henry Lomas & Co. and Walkers & Co. was carried on in the same manner as before; the account being kept as a continued running account, and very large sums in cash and bills were, after the date of the bond, paid in and paid out on account of Henry Lomas & Co., and duly credited and debited to them.

The Respondents, therefore, when the case afterwards came before the Court, contended, that the payments so made by Henry Lomas & Co. to the bankers, subsequently to the date of the bond, were applicable to the extinction or reduction of the balance due from Henry Lomas to the bankers, at the date of the bond.

On the 3d of May 1816, William Fidgeon died intestate, leaving Thomas Fidgeon his heir-at-law, who thereupon succeeded to the real estate of his brother. On the 20th of May 1816, a commission of bankrupt was duly awarded and issued against Henry Lomas, Edward Getley, and Thomas Fidgeon, under which they were duly found and declared bankrupts; and the Respondents were chosen assignees of their estate and effects, and the real and personal estates of the bankrupts were duly conveyed to the assignees. On or about the 3d of July 1816, the Appellants filed a bill in the High Court of Chancery against the assignees, and against the personal representatives of William Fidgeon. The bill was expressed to be filed on behalf of the plaintiffs, and all other the creditors of the said William Fidgeon, who should seek relief under and contribute to the expenses of the suit. The bill stated the facts above set forth, and then alleged that the plaintiffs had demanded payment of the said sum of 10,000*l.* and interest from the obligors, both before and after William Fidgeon's death, but that the whole sum, with interest, still remained due and unpaid. The bill prayed for an account as against the personal estate of William Fidgeon, and payment thereof; and that if the personal estate should prove insufficient, that the real estate, or a competent part, might be sold for that purpose; and that in the meantime the assignees might be restrained from selling the real estates.

The defendants appeared and put in their answers to the bill. Witnesses were examined on the part of the plaintiffs, principally for the purpose of proving the execution of the bond and the consideration for it.

Mr. Charles Brookfield, the solicitor of the plaintiffs, and one of the witnesses examined on their part,

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deposed, that the bond was given to the plaintiffs for securing to them the sum of 10,000 *l.*, and lawful interest, from the date thereof, which said sum was part of a much larger balance due to the plaintiffs at the time of the execution of the said bond, from the said Thomas Fidgeon, Edward Getley, and Henry Lomas.

The Vice-Chancellor, on 31st July 1819, made a decree granting the general prayer of the bill, but reserving the question whether the sums to which the estate of the intestate was liable, ought to be paid out of his real or personal estate. And it was ordered that the Master should inquire whether the plaintiffs held any, and what other securities for the money mentioned in the bond, and should be at liberty to examine the plaintiffs themselves.

The Master made his report on 16th July 1821. The debt reported due to the plaintiffs, was stated to consist of 10,000 *l.*, the principal sum due on the bond, and 2,944 *l.* 1 *s.* 3 *d.*, the interest thereof, at 5 *l.* per cent., from the 26th of August 1815, to the date of the report, from which was deducted 30 *l.* 13 *s.* 5 *d.*, the property duty payable in respect of such interest, leaving 2,913 *l.* 7 *s.* 10 *d.*, as the amount of the interest, and making the amount of the debt, at the date of the report, 12,913 *l.* 7 *s.* 10 *d.*

The Master, after stating other matters, certified by his report, that he had taken evidence which showed that Lomas, Getley, and Fidgeon were, at the time of their bankruptcy, indebted to the plaintiffs in the sum of 28,742 *l.* 17 *s.* 9 *d.* on a balance of the banking account; and as security for which balance the bond in question was given; and that the sum of 26,975 *l.* 19 *s.* 3 *d.*, or thereabouts, was then (the time of the examination) due and owing to them on the

balance of the account, and that the amount of the balance of the account had not at any time since the bankruptcy been less than 10,000*l.*; and that they had not received any sum of money on account of the bond, but they had received several sums of money on account of the balance of account, which balance had never since the execution of the said bond been less than 10,000*l.*, and that they did not hold any security given to them, for securing the payment of the money mentioned in the bond, but that they held sundry bills of exchange, and some other securities given to them for securing the payment of the balance of account, and which bills and other securities they held together with the bond for that purpose. And he referred to the evidence he had taken, and reported that the plaintiffs in a second examination stated, that the bond was given as a security to the extent of 10,000*l.*, for the balance of the banking account, in their former examination mentioned, which balance did, at the date and execution of the said bond, exceed, and had ever since exceeded, and did then at the time of their examination exceed, the sum of 10,000*l.*; and in the schedule to that examination they set forth the particulars of the bills of exchange, which they held as security for the balance of the banking account, and which were given to them by Henry Lomas & Co., and which securities thereby appeared to amount to the sum of 24,869*l.* 11*s.* 10*d.*, and they also claimed an equitable lien on the produce of certain goods shipped by Henry Lomas & Co. to America; and, upon consideration of the examinations, the Master found that no sum of money had been received by the plaintiffs, or any person for their or either of their use, on account of the said bond; and that the plaintiffs held certain bills of exchange,

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specifically mentioned in the report, jointly with the bond, as securities for the balance due to them on the banking account.

The Respondents took four exceptions to this report, of which the fourth is now the only one material to be considered. It was as follows—

For that the said Master has not taken an account of what is due to the plaintiffs, as he was directed to do by the said decree, but has only inquired what balance was due to the said plaintiffs from the said Henry Lomas, Edward Getley, and Thomas Fidgeon, at the time of the said bankruptcy, and has certified by his said report that the said bond is a security for such balance; whereas he ought to have certified that the said bond is not a security to them for such balance, and only for so much (if any) of the said debt which was due and owing to them at the time the said bond was given, as now remains unpaid, but which the said Master hath declined to inquire into or ascertain.

On the 19th of July 1822, the exceptions came on to be argued before his Honor the Vice-Chancellor, whereupon, by an order of that date, it was ordered that it should be referred back to the Master, to review his report, and the Master was to inquire and state to the Court whether the bond dated 26th August 1815, in the pleadings mentioned, was to be held as a security for the particular balance due to the plaintiffs on the banking account at the date of the bond, or for the general balance, which should from time to time remain due to them; and if the Master should be of opinion that the bond was to be held only as a security for the particular balance due at the date of the bond, then the Master was to inquire and state to the Court whether any and what sum then remained

due to the plaintiffs on such bond, from the estate of the intestate, and the Master was to state any circumstances specially, at the request of either party.

The Master made his second report on the 17th of January 1825. The Master thereby certified that the depositions of Brookfield, the solicitor of the plaintiffs, and of Mary Fidgeon the niece of William Fidgeon, and of Dyson, a clerk to the plaintiffs, and of Wood, a clerk to Henry Lomas & Co., had been read before him, and upon consideration of the said evidence, he found that the bond, and the condition thereof, were in the common and usual form of a joint and several bond for payment of money, with lawful interest for the same from the date thereof; except that the principal was expressed in the condition to be payable with lawful interest on demand, and not on any particular day; and he found that William Fidgeon, one of the obligors, was a surety only for Henry Lomas, Edward Getley, and Thomas Fidgeon, the other obligors therein named, and that Henry Lomas, Edward Getley, and Thomas Fidgeon, were partners in trade, and kept an account with the plaintiffs, who carried on the business of bankers in partnership; and he found that the bond was executed by William Fidgeon, on or about the date thereof, and that such his execution was attested by the said Mary Fidgeon, a witness examined on the part of the plaintiffs, and that the bond was, on the 13th day of January 1816, re-executed by him, and that such re-execution was witnessed by Charles Brookfield; and that the bond, executed by all the obligors, was delivered by Henry Lomas to the plaintiffs, or one of them, and that Henry Lomas, Edward Getley, and Thomas Fidgeon, meant and intended that the bond should be held by the plaintiffs as security for the general balance which should from time to time

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remain due from them; but it had not been proved before him that William Fidgeon ever made any agreement, declaration, or acknowledgment, whether the said bond was to be held as a security for the particular balance due to the plaintiffs on the banking account, at the date of the bond, or for the general balance which should from time to time be due to them; and the only evidence produced before him of the intention with which William Fidgeon gave the bond was (as he conceived), the circumstance of his having, on the application of the said Charles Brookfield, as attorney for the plaintiffs, re-executed the said bond on the 13th of January 1816, without having made any inquiry as to the amount of the balance then due from the said Henry Lomas, Edward Getley, and Thomas Fidgeon, to the plaintiffs; from which circumstance he presumed that William Fidgeon considered the bond as given by him for the general balance which might from time to time be due to the plaintiffs.

The Appellants and Respondents alike took exceptions to this report. It is only material to mention the exceptions of the latter. The Respondents excepted to those parts of the report which stated the bond to have been given as a security for a general balance. These exceptions were heard by the Vice-Chancellor, who, by an order dated the 12th of December 1826, allowed them, and overruled the Report on this point. The order of the Vice-Chancellor was afterwards, by petition of appeal, brought before Lord Chancellor Brougham, who dismissed the appeal with costs. The Appellants then appealed to this House.

Sir *F. Pollock* and Mr. *Wigram*, for the Appellants:—The question for consideration now is, whe

ther, when there is a running account between the banker and the customer, a simple bond, without recitals given to secure a sum of money, with interest, can be treated as a restricted security for money due at the time, or may be said to be given to secure money which at a future time may become due. That such a security may be a security for a general balance will be clear from the authorities. The obligors must show that the debt for which the bond was given has been discharged. What was that debt in the present case? Bills were running at the time, and till they had run out no one could know what the debt was. There is no evidence that the bond was given for any particular sum of money then known to be due. In the absence of anything to show such an intention, it must be construed as a continuing security, *Woolley v. Jennings* (a). The Respondents must show that the bond was restricted to securing a sum of money then due, and must also show that particular sum to be discharged before they can contend that they are released from liability. Fidgeon himself by asking, on the re-execution of the bond, what was the amount of the debt then due, showed that he considered that that debt might vary in amount from time to time. The principle on which this bond must be construed is stated in *ex parte Langston* (b), where, in the case of a deposit of deeds, an equitable mortgage was held to be created; and it was said "it is not probable that a person who has made an advance upon a security which he holds should make further advances without any security." That principle was acted on in *Woolley v. Jennings*, and if the word "bond" is substituted for "warrant of attorney," which was the instrument

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(a) 5 Barn. & Cres. 165.

(b) 17 Ves. 227, see p. 231.

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given there, the two cases are identical. *Pease v. Hirst* (c) is to the same effect: there the instrument was a note. A. wishing to obtain credit with his bankers, in 1817, prevailed upon three persons to join him in a promissory note, whereby they jointly and severally promised to pay to the bankers 300*l*. The bankers gave A. credit in his pass-book for 300*l* on account of the note, and charged him with interest for the same yearly. It was held that the note was a continuing note, and that it was not discharged by reason of A. having at one time in the hands of his bankers a balance exceeding in amount the sum secured by the note. *Hargrave v. Smee* (d) was the case of a guarantee for the payment for goods to be delivered to J. & S., "according to the custom of their trading with you, in the sum of 200 *l*." The custom of the trading was to make up monthly accounts, and for J. & S. to give acceptances for the amount of each monthly account. The instrument was held to be a continuing guarantee. From these cases it is clear that the principles governing the construction of these instruments are, first, that it is not to be presumed if a man has made advances on a security that he will afterwards make other advances without any security; secondly, that if the instrument given as a security is not limited in its terms, it must be considered as a continuing guarantee; thirdly, that if it is a bill of exchange it is an available security until it is actually discharged; fourthly, that the instrument must be taken most strongly against the party making it. The case of *Kirby v. The Duke of Marlborough* (e) will be cited on the other side. The bond there was construed to be a single guarantee;

¹ (c) 10 Barn. & Cres. 122.

(d) 6 Bing. 244.

(e) 2 Maule & Selw. 18.

but that was because there were words on the face of the bond which expressed such to be the intention of the parties, and such was considered to be the effect of the case when it was cited in the subsequent case of *Woolley v. Jennings*. Reliance will also be placed on the fact that the condition of the bond describes the money as payable on demand, and also that it is payable, with interest, from the date of the bond. But neither of these circumstances is sufficient to show that the bond was given to secure a particular balance. If the construction contended for by the Respondents is good, there must have been twenty-four such bonds in every year to induce the Appellants to go on with their advances, for there were dealings between these parties to the amount of 20,000 *l.* a month, a fact which shows that the bond must have been considered, by both obligors and obligees, as given to secure a floating balance. The principle drawn from Clayton's case (*f*), *Bodenham v. Purchas* (*g*), and *Simpson v. Ingham* (*h*), that the Appellants were bound, in favour of the sureties, to apply in discharge of the security the first available balance that came into their hands, does not apply here, for the bond is not like the instrument in Clayton's case, payable instant. In *Pease v. Hirst*, though the debt was in reality wiped out of the account and satisfied, yet it was held that the promissory note was not satisfied, because it was a security of a collateral nature. That most clearly proves that Clayton's case and the others do not apply here, as the 10,000 *l.* did not get in to the accounts at all.—[Lord *Lyndhurst* : Clayton's case would apply distinctly to a case where it was clear that the security was given for a first and

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(*f*) See *Devaynes v. Noble*, 1 Mer. 592.

(*g*) 2 Barn. 2 Al. 39.

(*h*) 2 Barn. & Cres. 65.

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only advance.]—It would so, but not to a case like the present. If particular circumstances attending this case had not compelled the parties to resort to equity, and they had gone into a court of law, the onus of showing that the bond was satisfied would have rested with the present Respondents. Suppose then the case to stand on pleadings at common law, the defendant would plead that the bond was given to cover a specific balance; the plaintiff would traverse the plea; the proof would lie on the defendant. Under the circumstances of this case the defendant could not make out that plea by proof. The Master here has found that this bond was given for the general balance of the account. Even in that case the order of the Court below must be varied. Suppose that at any time the bond might have been claimed by the Respondents to be given up to them as satisfied, their not claiming it gave the Appellants a fresh right upon it. On the whole, the principle stated by Lord Ellenborough, in *Atwood v. Crowdie* (i), applies most strictly to the present case. His Lordship there, speaking of bills deposited with the plaintiffs as a security for a banker's balance, says, "It is clear that there was a period when the plaintiff's lien ceased to attach, and when the bills might have been reclaimed, but they were not reclaimed, and, by allowing them to remain in the hands of the plaintiffs, the lien re-vested when, upon fresh advances made, the balance turned in favour of the plaintiffs; it was so in this case. The decree of the Court below is therefore not warranted by the authorities, and must be reversed.

Mr. Pemberton and Mr. Jacob (Mr. Whately was with them) for the Respondents:—The decree here is

(i) 1 Stark. 483.

perfectly correct and must be sustained. It is not every instrument deposited with a banker for a particular purpose that he can appropriate to the purposes of a general security for any possible floating balance. *Woolley v. Jennings* cannot be supported. *Giles v. Perkins* (*k*), *Thomson v. Giles* (*l*), *Ex parte Armistead* (*m*), *Ex parte Pease* (*n*), and *Ex parte Benson* (*o*), show under what circumstances instruments deposited with bankers must be returned to those who deposited them for a particular purpose. *Lord Arlington v. Merrick* (*p*) shows that the condition of a bond given by a surety is not to be extended by construction, and the principle there acted on has never been disputed up to the present time. *Wright v. Russel* (*q*), and *Barker v. Parker* (*r*), follow out that principle; and in both those cases the construction put upon the bond was determined by the apparent intention of the parties. *Barclay v. Lucas* (*s*), quoted in the last named case, has never been considered of great authority, and was treated in *Dance v. Girdler* (*t*) as not in fact invalidating the position already stated. In *Kay v. Groves* (*u*), the limited rule of construction was adopted, and a guarantee for "five sacks of flour delivered to T., payable in one month," was held to be a guarantee for flour not exceeding five sacks, delivered at one time, and not a continuing guarantee for parcels delivered at various subsequent periods, though not exceeding in the whole five sacks. In *Melville v. Hayden* (*x*), a guarantee for the pay-

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(*k*) 9 East. 12.
(*l*) 3 Dowl. & Ry. 733; 2 Barn.
& Cres. 422.
(*m*) 2 Glyn. & J. 371.
(*n*) 19 Ves. 225.
(*o*) 1 Deac. & Ch. 435; 1
Mont. & B. 120.
(*p*) 2 Saund. 411.

(*q*) 3 Wils. 530; 2 Sir W. Bl. 934.
(*r*) 1 Term Rep. 287.
(*s*) 3 Doug. 321; 1 Term Rep.
291 n.
(*t*) 1 New Rep. 34.
(*u*) 6 Bing. 276; 3 Moore &
P. 634.
(*x*) 3 Barn. & Ald. 593.

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ment to A. B., "to the extent of 60*l.*, at quarterly account, bill two months," was held not to be a continuing guarantee, but was applicable only to the first quarterly payment after it was given; and in *Nicholson v. Paget* (*y*), a similar rule of construction was applied, the principle of not constructively extending the liability being fully acted on.—[Lord *Lyndhurst*: The instrument here is not a guarantee, it is, on the face of it, a mere bond. There is a distinction as to the proceedings upon bonds in law and equity. At law, the bond being proved, the plaintiff would have a verdict for the whole amount; in equity, he must show how much of the bond is owing, and also the consideration for which it was really given.] —Then what was the consideration for this bond? Was it a debt at that time due, or a debt which might possibly never become due at all, or not till many years afterwards? If it was for the debt then due, and that debt has since been satisfied, could not W. Fidgeon have demanded the bond to be delivered up? His having omitted to do so cannot make a security once satisfied become again available for a fresh debt. If *Pease v. Hirst* is admitted to be a good authority it would overrule Clayton's case. But Clayton's case has never been overruled, and is still considered as authority. In what way is interest claimed here? Is it on the sum of 10,000*l.* due at the date of the bond? If so, that shows that the parties themselves treated the bond as a security for money then due; but that money has since been paid, and the bond therefore has been satisfied.

Sir *F. Pollock*, in reply :—It must not be inferred, that because the bond is stated in the condition to be

(*y*) 1 *Crom. & Mec.* 48; 3 *Tyr.* 164; 5 *Car. & P.* 395.

payable on demand it was given for a debt due at the time. *Woolley v. Jennings* is not in the least degree distinguishable from the present. This instrument is not a guarantee, nor is the proceeding one against a surety; the debt is, by this bond, made the debt of W. Fidgeon himself. All the cases, therefore, of guarantees and sureties, and the rules of construction applicable to those cases, are inapplicable here. The principle quoted from Clayton's case is not new. It was stated in *Dawe v. Holdsworth* (z), which laid down the rule that, in a running account, the credits went to extinguish the earlier debits; but it is not applicable here, and this case must be governed by that of *Woolley v. Jennings*.

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Lord *Lyndhurst*:—This was an appeal from a July 14, 1837. decree of Lord Chancellor Brougham, affirming a judgment of the Vice-Chancellor, and the sole question is this: A bond was entered into by H. Lomas and his partners, and W. Fidgeon as their surety, and given to Walker & Co., who were bankers, and creditors of H. Lomas & Co., and the question is, whether this bond was for the purpose of securing a debt then due, or for the purpose of securing any future balances which might exist on the account between Lomas & Co. and Walkers, the bankers. On the face of the bond there is nothing to show that it was a security for future balances; on the contrary, the circumstance that interest was reserved from the date of the bond, would lead to the conclusion that it was intended not to be for a future debt, but for a debt then existing, or then only would it carry interest. If it was intended as a security to cover future balances, it would be more or less inconsistent with probability that

(z) Peake, 64.

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there should be a security variable in its amount, and yet carrying interest on the possible increase. So far, therefore, the inferences of probability carry us. But then it is said, that this bond was deposited as a security for future balances, and that the Master, by his report, so found, and that from the nature of the transaction it must have been so, and that it would not be a benefit for the bankers to have a security for an existing debt, which might soon be wiped off, but that it would be of advantage to have a security for balances which might afterwards accrue between these parties, Lomas & Co. and themselves. I have not any doubt that, as between Lomas & Co. and the bankers, it might have been so intended. But then the question is, whether that can affect William Fidgeon, the surety? Lomas & Co. might so deposit the bond with the bankers, as a security for future balances, but they are not by that mode of dealing between themselves, to vary the liability of William Fidgeon, the surety in the bond, unless he gave them authority for that purpose. There is no evidence that he did give any such authority; there is nothing to show that Fidgeon thought the bond was a security for floating balances. The observation I have just made applies as against H. Lomas & Co., who are men of business, but that does not appear to be the case with Fidgeon, who was indeed so unacquainted with business, that he thought he was only liable for one-fourth of the amount. The Master found that when the bond was re-executed, Fidgeon asked what the debt then was? Upon that fact, it is contended that he thought the bond was not for any debt then existing, but for floating balances. The answer to that argument is, that it is clear that he was not a man of business, and it was natural for him to ask whether

the debt then existing was the same in amount as when the bond was first given. He might think that in the meantime it had been reduced by payments. From that question alone, I do not think that any inference can be drawn affecting the rights of Fidgeon. There is, I repeat, nothing to show that he really imagined the bond to be for a floating balance. I am therefore of opinion that the judgment of the Court below should be affirmed, and that Fidgeon should be declared not liable for more than the debt as it existed when the bond was first entered into. I think that the judgment ought to be affirmed, with costs.

Lord *Brougham* concurred.

Judgment affirmed, with costs.

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APPEAL

Feb. 20, 21.
March 13.

FROM THE COURT OF CHANCERY, IN IRELAND.

The Right Honorable the Earl of MILL-
TOWN, and BARBARA, Countess of } *Appellants.*
MILLTOWN, his Wife - - - - }

The Honorable WILLIAM LE POER }
TRENCH, EYRE COOTE, JOHN HAWKES- } *Respondents.*
WORTH, RICHARD STEELE HAWKES- }
WORTH, and Others - - - - }

Will.
Construction.
Legacies.
Interest.

A testator gave all his freehold and leasehold estates to trustees, to the use of other trustees for a term; on trust, if there should be issue of his marriage, to raise 2,000 *l.* a year for his wife for her life in lieu of dower; and if there should be younger children, to raise portions for them, to be paid to them in equal shares, in default of appointment by the wife, at the age of 21 if sons, and 21 or marriage, if daughters; but if these events should happen in the wife's lifetime, then the shares to be vested interests, payment to be postponed till her death, and the trustees of the term to raise in the meantime, out of the rents, &c., sums equal to interest on the portions for their maintenance: And on further trust, in case of the insufficiency of the personal estate for payment of debts and legacies which should become payable under the will, to raise, *after the wife's death*, by sale or mortgage, or out of the rents, &c. of the premises comprised in the term, a sufficient sum to pay said bequests or legacies. Subject to the term, the testator limited the estates to the first and other sons of his marriage in tail male, remainder to daughters in tail, and in default of issue, to his wife for life, in lieu and discharge of dower, and of all provision made for her by his own or his father's will, with divers remainders over. He then gave a great number of pecuniary legacies, some to be paid in any event, and with interest, others to be paid only in the event of his leaving no issue,

and not expressed to bear interest; and, of these latter, some were directed to be vested in stock for the benefit of relations for life, remainder to their children. And after directing that all the legacies should bear interest from the time they should become respectively *payable*, and be raised and paid accordingly, he charged the estates and premises comprised in the term with payment of such debts and legacies in case of the insufficiency of his personal estate, and he directed the trustees to raise the same, pursuant to the trusts vested in them for that purpose.

The testator died without issue: his personal estate was exhausted in paying debts and the legacies that were directed to be paid in any event, and which were declared to have priority. The questions were, When were the other legacies to bear interest, and how was it to be paid?

HELD, that the unpaid legacies were well charged on the lands comprised in the term, but were not to be raised until after the death of testator's wife, and that interest on them should be paid during her life out of the rents and profits of the said lands.

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CHARLES HENRY, first LORD CASTLECOOTE, of Leopardstown, in the County of Dublin, by his will, bearing date the 14th of September 1822, bequeathed to the Honorable William Le Poer Trench, Hulton Smith King, and John Sealy Townsend (among other things), all his stock in the English and Irish funds, upon trust, that they should stand possessed thereof, and receive the interest and dividends from his decease, and pay the same to his son, Eyre Tilson Coote, during his life, and from the decease of his said son, in case his said son's wife, Barbara Coote, should survive him, in trust, out of the interest and dividends of the said trust funds, to pay her during her life an annuity of 400 l.; and from the decease of the said Eyre Tilson Coote, and in case he should die without issue living at his decease, then in trust to pay

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to testator's brother, Sir Eyre Coote, during his life, the annual interest, proceeds, and dividends of the said trust funds; and if Eyre Coote, the only son of the said Sir Eyre Coote, and nephew of testator, should survive his father, then in trust to permit him (Eyre Coote) to receive for his own use the annual interest and dividends of the said trust funds.

The testator, after disposing of his freehold estates to, or to the use of, his said son, as in the will mentioned, and after making several pecuniary and specific bequests to several persons, directed that his debts, legacies, and funeral and testamentary expenses should be paid out of the produce of his personal estate not otherwise disposed of; and in case his personal estate should be insufficient for that purpose, he charged all his freehold estates with the payment thereof; and subject thereto he gave and bequeathed all the rest of his estate, freehold and personal, not before disposed of, unto his said son, Eyre Tilson Coote, his heirs, executors, administrators and assigns for ever, and he appointed Sir Eyre Coote and John Hawkesworth, executors of his said will.

The testator died on the 22d of February 1823, leaving Eyre Tilson Coote, his only child him surviving. Sir Eyre Coote survived the testator, and shortly after died, and the will was proved in the Court of Prerogative in Ireland by John Hawkesworth, the surviving executor, who, on the 10th of May 1824, died intestate, and his son John Hawkesworth, jun., one of the Respondents, took out administration to his effects. Eyre Tilson Coote, on the death of his father, became Lord Castlecoote, and afterwards obtained administration with the will annexed of his goods and chattels unadministered by John Hawkesworth, the elder.

John Sealy Townsend, one of the trustees named in the will, declined to act in the trusts thereof; and in January 1825, William Le Poer Trench and H. S. King, the two remaining trustees, exhibited their bill in the Court of Chancery in Ireland, against Eyre Tilson, Lord Castlecoote, and others, praying that the trusts of the will might be carried into execution under the direction of the Court, and for an account of the real and freehold estates of the said testator, and of the charges and incumbrances affecting the same; and also for an account of his personal estate, and of his debts, legacies, and funeral expenses, and that the same might be applied in a due course of administration.

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Eyre Tilson, Lord Castlecoote, and the Appellant, Barbara Countess of Milltown (then Barbara, Lady Castlecoote, his wife), put in their answer to the bill in November 1826. Before any further proceedings were had in the cause, H. S. King died, leaving William Le Poer Trench, his co-trustee and co-plaintiff, him surviving.

Eyre Tilson, Lord Castlecoote, died in February 1827, leaving the Appellant, his widow, him surviving, and without leaving any issue; and by his will, bearing date the 23d of October 1826, and duly attested so as to pass real estates, he devised to Francis Gore and George Frederick Brooke, their heirs, executors, &c., all his real, freehold, and leasehold estates, lands, and hereditaments, situate in Ireland, and also the impropriate tithes which formerly belonged to the Earl of Thomond, in the county of Clare, to the use of William Furlong and John Smith Furlong, for the term of 500 years, to commence from the time of his decease, upon trust, that they, and the survivor of them, and the executors and adminis-

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trators of the survivor, should, out of the rents and profits of the hereditaments and premises comprised in the said term, or by mortgage, sale, or other disposition thereof for all or any part of the said term, or by any other lawful ways and means they should think fit, levy and raise during the life of his wife, Barbara, Lady Castlecoote, in case there should be issue of his said marriage who should be living at his death, an annuity of 2,000 *l.* clear of all deductions whatsoever, in addition to the provision made for her by the will of his father, but in lieu and discharge of any dower or thirds which she might claim, or be entitled to, out of the testator's real or personal estate, and that they should pay the same to her or her assigns for her own proper use and benefit during her life, by equal quarterly payments, at such times as in the said will declared, with powers of distress and entry in case of non-payment: And upon further trust, in case there should be one or more child or children of his body by his said wife, other than and besides an eldest or only son, living at the time of his decease, or born in due time thereafter, that the said trustees should, after his decease and the decease of his said wife, by demise, mortgage, sale, or other disposition, of all or any part of the hereditaments and premises comprised in the said term, for all or any part of the term, and by and out of the rents, issues, and profits thereof, or by any other means they should think fit, levy and raise for the portions of such younger child or children the sums in the will specified, not exceeding in the whole the sum of 20,000 *l.*, payable at such time and in such manner as his said wife should by deed or will, to be executed and attested as in the said will expressed, direct or appoint; and in default of appointment, equally to be divided between

them, the share or shares of such of the said children as should be a younger son or sons, to be paid at their respective ages of 21 years, and of such as should be a daughter or daughters, at 21 or day or days of marriage, in case the same should happen after the decease of his said wife. But in case any such younger children, being a son or sons, should attain the age of 21 years, or, being a daughter or daughters, should attain that age, or be married in the lifetime of his said dear wife, then the share or shares of such younger child or children should become a vested interest or vested interests in him, her, or them respectively, but the payment of their share or shares should be postponed until after the decease of his said wife, unless she should signify her consent that the same should be raised and paid in her lifetime. And upon further trust, that the said trustees should, by and out of the rents, issues, and profits of the premises comprised in the said term of 500 years, levy and raise such yearly sum as should be equivalent to the interest of the said specified sums, after the rate of 5*l.* per cent. per annum, and also should pay and apply such sum for the maintenance and education of such child or children, until such child or children should become entitled to his or her portion as aforesaid. And upon further trust, in case the testator's personal estate should be found insufficient for the payment of his debts, and the several legacies and charitable bequests which should, under the provisions of his will, take effect and become payable, then that the said trustees, and the survivor of them, and the executors and administrators of such survivor, might and should, after the testator's decease, and after the decease of his said wife, by demise, sale, or mortgage, or other disposition of all or any of the messuages,

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hereditaments, and premises comprised in the said term of 500 years, or a competent part thereof, for all or any part of the said term, or by and out of the rents, issues, and profits thereof, or by all or any other ways or means they should think fit and reasonable, levy and raise such sum and sums of money as should be sufficient to discharge the said bequests and legacies, or such of them respectively as should take effect and become payable under the testator's said will, and for discharge whereof his personal estate should be found insufficient.

And it was by the said will declared, that the trustees of the inheritance should join the trustees of the term of 500 years in any mortgage or sale of the trust estates for raising the sums of money for the purposes aforesaid, in order, if the said trustees of the term required it, that the fee and inheritance of the said lands might be mortgaged, or absolutely conveyed, freed, and discharged of the uses, estates, trusts, limitations, charges, powers, and provisions in the will limited, declared, and expressed concerning the same. And from the expiration or other sooner determination of the said term, and in the meantime subject thereto, and to the trusts thereof, the testator limited the said estates by the said will to the use of the first and every other son of the testator on the body of the said Barbara his wife to be begotten, and their issue in tail male, with remainder to the use of the daughters of the testator and of said Barbara, and their issue in tail general: And in default of such issue of his body by his said wife, sons, or daughters, who should be living at testator's decease, to the use of his said wife and her assigns for her life, without impeachment of waste, in lieu and satisfaction of any dower, jointure, or pro-

vision theretofore made or provided for her by testator's late father, or by the testator's own will, or in any manner whatsoever: And from the determination of that estate, then to the use of testator's kinsman, Eyre Coote, of West Park (the father of the Respondent Eyre Coote), for his life; and from and after his decease to the use of his (Eyre Coote's) first and every other son, successively in tail male, and in default of such issue to the use of his daughter or daughters, and the heirs of their bodies; and for default of such issue to the use of the testator's own right heirs for ever.

The testator by his said will bequeathed to Maria Meredith, sister of his said wife, 4,000*l.*, to be paid within one year after his death, with interest at 5*l.* per cent. until paid. And he bequeathed to the Respondents, John Hawkesworth and Richard Steele Hawkesworth, his executors, 3,000*l.* upon trust, to be laid out in the public funds in their names, and to pay the yearly interest thereof to Frances O'Reilly, otherwise Meredith, the wife of Philip O'Reilly, another sister of his said wife, to her sole and separate use; and after her death to pay the principal sum to the use of her children, in such manner as she should by deed or will appoint. And the testator bequeathed the several legacies hereinafter mentioned, to take effect and be paid only in case there should not be issue of his body by his said wife Barbara living at the time of his death (that is to say): he bequeathed to his said executors 2,000*l.* upon trust, to invest the same in the public funds, or upon real security, in their names, in trust, to pay the yearly interest and dividends thereof to his kinsman, Major General James Bathurst, and his assigns, during his life; and after his death, in trust, to pay the said principal sum to

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and amongst his children, in such shares and at such times as he should by deed or will appoint; and in default of such appointment, in trust, to pay the said principal sum to such children equally, share and share alike. And the testator bequeathed to his said executors a further sum of 2,000*l.*, to be in like manner invested for the benefit of testator's kinsman, Henry Bathurst and his children; and he also bequeathed to his said executors a further sum of 2,000*l.*, to be invested in like manner for the benefit of Robert Bathurst and his children; and he bequeathed to his (testator's) cousin, Henrietta Mahon, otherwise Bathurst, 1,000*l.* for her sole and separate use; to his cousin, Caroline de Crespigny, otherwise Bathurst, 1,000*l.* for her sole and separate use; to his cousin, Tryphinia Bathurst, the sum of 1,000*l.* *with interest at 6*l.* per cent. until paid*; to Arthur Magan, 1,000*l.*; to William Henry Magan, 500*l.*; to Percy Magan, 500*l.*; to his cousin, Louisa Reitzenstein, otherwise Magan, 500*l.*; to his cousin, Emily Medlicott, 500*l.*; to his kinsman, Thomas Magan, 300*l.*; to his kinsman, Henry Magan, 500*l.*; to his cousins, Eliza Harriet and Charlotte Magan, 100*l.* each; to Jane Coote, 500*l.*; to Philippa Peacock, 500*l.*; to Letitia Lawrence, otherwise Peacock, 500*l.*; to Francis Gore, 100*l.*; to George Frederick Brooke, 300*l.*; and to Richard Steele Hawkesworth, 300*l.*: And he declared it to be his will that the legacies to Maria Meredith, Frances O'Reilly, Francis Gore, G. F. Brooke, and R. S. Hawkesworth should *in any event* be raised and paid, without prejudice, however, to the charitable bequest next hereafter mentioned, but that the several other legacies should not take effect, and be paid or payable, unless there should happen to be no issue of him the testator by his said wife.

The testator also bequeathed to the most Rev. Dr. Murray, Roman Catholic Archbishop of Dublin, for the charitable purposes in the said will mentioned, 2,000*l.*; and to the testator's said wife, 2,000*l.*, which he directed should be paid to her in any event, and in preference to all other legacies, except the said charitable bequest, with interest from the testator's decease at 5*l.* per cent., and the testator directed that all the legacies by his will bequeathed should, from the time they respectively should become payable, bear interest at the rate of 5*l.* per cent., and be raised and paid accordingly, and he further directed that his funeral and testamentary expenses, and the charitable bequest above mentioned, should be paid out of the produce of his personal estate; and after payment thereof, that the residue of his personal estate should be applied in payment of his debts, and the several other legacies which should take effect and become payable under his said will. And in case his personal estate should be insufficient for that purpose, the testator charged the estates, lands, and premises, comprised in the said term of 500 years, with the payment of such his debts and of the legacies thereinbefore bequeathed, with the exception of the said charitable bequest, which he directed should be paid out of his personal estate; and he directed the trustees of the said term of 500 years to raise the same, pursuant to the trusts vested in them for that purpose; and, subject to the payment of such debts and legacies, the testator bequeathed the residue of his personal estate to his wife, Barbara, Lady Castlecoote; and of the said will he appointed the Respondents, John Hawkesworth and Richard Steele Hawkesworth, executors.

On the 30th of April, 1827, the Honorable William Le Poer Trench, exhibited his bill of revivor and

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amendment against Eyre Coote, father of the Respondent Eyre Coote, as the heir at law, and John and Richard Steele Hawkesworth, as personal representatives, of the said Charles Henry, Lord Castlecoote, and of Eyre Tilson, Lord Castlecoote, respectively, and against Barbara, Lady Castlecoote, and the several legatees named in the said will of Eyre Tilson, Lord Castlecoote, stating the death of H. S. King, his co-trustee and co-plaintiff in the original bill, and the death and will of Eyre Tilson, Lord Castlecoote, and praying that the original suit and proceedings might be revived against the said defendants, and further praying, in addition to the relief prayed by the original bill, that it might be declared that the said Eyre Tilson, Lord Castlecoote, had made his election to take under the said will of his father Charles Henry, Lord Castlecoote; and that the rights of all parties interested in the execution of the will of Charles Henry, Lord Castlecoote, might be ascertained by the decree of the Court. And the bill further prayed, that if it should be found expedient for the due execution of the said will, that the trusts of the will of Eyre Tilson, Lord Castlecoote, should likewise be carried into execution under the direction of the Court, then that an account should be taken of his real and freehold estates, and of his debts and legacies; and that his estate and effects, real and personal, might be applied, pursuant to his will, in discharge of his debts and legacies.

The several defendants answered the bill. In June 1828, the Appellant, Barbara, Lady Castlecoote, married the Appellant, the Earl of Milltown, whereupon the bill of revivor and amendment was again amended by making the trustees of the Appellant's marriage settlement parties defendants thereto.

The cause came on to be heard on the 1st of August,

1829, before the then Lord Chancellor of Ireland, when his Lordship declared that the will of the said Charles Henry, Lord Castlecoote, was well proved; and decreed that the trusts thereof should be carried into execution; and that one of the Masters should take an account of the real, freehold, and personal estates of the said testator, and of his debts and legacies; and should distinguish the trust funds bequeathed to the plaintiff in the suit, and his co-trustees, by the said will, from the residue of the personal estate of Charles Henry, Lord Castlecoote; and also that an account of the real, freehold, and personal estate of Eyre Tilson, Lord Castlecoote, should be taken, and an account of his debts, legacies, and funeral and testamentary expenses, and of all incumbrances affecting his real and personal estate at the time of his decease; and also that the Master should inquire and report whether or not the said Eyre Tilson made his election to take under the will of the said Charles Henry, Lord Castlecoote.

The Master made his report, pursuant to the decree, on the 11th of June, 1833; the Appellants and Eyre Coote (father of the Respondent, Eyre Coote) took several exceptions to the report, and the cause was heard upon the report and exceptions, on the 20th of the same month, when the Lord Chancellor overruled the said several exceptions, and ordered it to be referred to the Master, amongst other things, to inquire and report the value of the life estate of the defendant Eyre Coote (the Respondent, Eyre Coote's father) in the said trust funds; and it was decreed that the amount of such valuation should be paid to him out of the said trust funds, and the residue thereof was declared to constitute part of the residue of the personal estate of Charles Henry, Lord Castlecoote, to which Eyre Tilson, Lord Castlecoote, was entitled under his

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will, and was applicable to the payment of his debts and legacies. And it was referred to the Master to report the particulars and amount of the estates, real and personal, of Charles Henry, Lord Castlecoote, and of Eyre Tilson, Lord Castlecoote, applicable to the payment of their debts, legacies, and funeral expenses. And it was further ordered that the Master should report the priorities of the several demands comprised in his report of the 11th of June 1833.

Pursuant to that decree, the Master made his report, dated the 31st of May 1834, and thereby found the value of the life estate of Eyre Coote (father of the Respondent, Eyre Coote), in the said trust funds, to be 13,261*l.* 9*s.* 10*d.*, and the personal estate of Charles Henry, Lord Castlecoote, applicable to the payment of the legacies bequeathed by his will (his debts having been all paid), to consist of the following particulars, viz. 18,461*l.* 10*s.* 9*d.* Old 3½ per Cent. stock, then of the value of 18,369*l.* 16*s.* 2*d.*, and certain other stocks and funds of the value of 9,058*l.* 16*s.* 7*d.* (subject to deduction thereout of the value of the said life estate of Eyre Coote), and of certain chattel interests in the report mentioned. And the Master by his said report found that the personal estate of Eyre Tilson, Lord Castlecoote, consisted of the residue of the personal estate of Charles Henry, Lord Castlecoote, after the payment of his debts and legacies, and of certain other particulars in the report mentioned. And the debts and legacies payable out of the personal estate of Eyre Tilson, Lord Castlecoote, were found by the said report to amount to a sum of 31,239*l.* 19*s.* 1½*d.*; the debts amounting only to 89*l.* 12*s.* 8½*d.*

On a general view of the Master's report the personal estate of Eyre Tilson, Lord Castlecoote, might be estimated at about 16,000*l.*, being less by about 15,000*l.*

than the said amount of his debts and legacies. The annual income of the real estates was stated to be 4,200 *l.*, and the interest upon the legacies claimed to be raised out of it, in consequence of the insufficiency of the personal estate, was estimated at about 800 *l.* per annum ; so that after the application of the personal estate to the payment of the legacies, and keeping down the interest claimed upon those to which it would not extend, the Countess of Milltown would be entitled for her life to the residue of the rents of the real estates, amounting to about the yearly sum of 3,400 *l.*

Eyre Coote having died soon after the date of the last stated report, the suit was revived on the 28th of October 1834, against his infant son and heir at law, the Respondent Eyre Coote, and against the Respondents Eliza Rosetta Massey Coote, John Keily, and the Reverend William Johnson Yonge, as personal representatives of the said Eyre Coote deceased; and by an order, bearing date the 14th of November 1834, Roderick Connor, Esq., one of the Masters, was appointed guardian *ad litem* of the said Respondent Eyre Coote. By another order, bearing date the 13th of February 1835, it was referred to the Master to inquire and report whether it would be for the benefit of the said infant that the proceedings had in the original cause should be adopted, or whether the several accounts should be again taken as against him. The Master, on the 6th of May 1835, made his report that the accounts ought to be adopted, and that it would not be for the benefit of the infant that they should be taken over again.

The cause was heard on the 16th and 17th days of June 1835, and on the said 17th of June, it was decreed by the Lord Chancellor of Ireland, amongst other things, that the plaintiff in the cause should have the

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benefit of the former decrees and proceedings, against the Respondent Eyre Coote; and it was declared that Eyre Tilson, Lord Castlecoote, in his lifetime, had made his election to take under the will of his father, Charles Henry, Lord Castlecoote, the estates thereby devised to him, and that he was bound to give effect to the provisions of that will. And it was decreed that the personal estate of Eyre Tilson, Lord Castlecoote, should be applied in payment of his debts and legacies, and the costs of certain defendants in the cause; and in the event of the funds, after payment of the demands of the creditors and legatees, who were reported entitled to priority, being insufficient for the payment of the other legatees, whose demands were reported not to have any priority, that the several last-mentioned legatees should abate rateably the amount of their demands; and it was decreed that the balance to remain due to them, after the several funds should be applied, was well charged on the lands comprised in the term of 500 years created by the will of Eyre Tilson, Lord Castlecoote, but that the principal sums which should remain due, should not be raised or paid until after the decease of the Countess of Milltown; and that upon her decease the same should be raised by a sale of the lands comprised in the said term; *and it was decreed that, during the life of the Countess of Milltown, the interest of the principal sums was well charged on the lands comprised in the said term, and should be paid out of the rents and profits thereof during her life.* And it was ordered that the Master should forthwith proceed to allocate the personal estates of both the Lords Castlecoote, as far as the same consisted of funds then available, and so far as they would extend among the several persons entitled thereto (a).

(a) The Lord Chancellor (Lord Plunket), in pronouncing the

in so much of the decree as directed that the
it on the unpaid legacies of Eyre Tilson, Lord

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observed, "the question is how and when the interest of the bequeathed by the will of the second Lord Castlecoote is discharged. He devised all his estates to two trustees, subject to a term of 500 years, which was vested in two other trustees, the following trusts, that is, in the first place, to pay 2,000 *l.* to Lady Castlecoote for her life in lieu of jointure, in case there should be issue of their marriage living at his death, and also provision for younger children; and in case his personal estate should prove insufficient for the payment of his debts and legacies, the trustees of the term should, after his decease, and after the death of his wife, by demise, sale, or mortgage, or out of the rents, and profits thereof, raise a sum sufficient to discharge such debts, as the personal estate should be insufficient to discharge. The amount of the legacies bequeathed is 26,000 *l.*; some expressed interest at six per cent., and some at five per cent. He devised a legacy of 2,000 *l.* to his wife, to be paid to her with interest at five per cent. from his decease. The testator's intention evidently was that the legacies should be paid out of the personal estate, and should bear interest at five per cent.; and in case his personal estate should be insufficient, that the lands comprised in the term of 500 years should be charged with the payment of his debts and legacies; and subject to the said debts and legacies he bequeathed the rest of his personal estate to his wife.

As to the disposition of the inheritance, the testator devised all the lands after the expiration of this term, and subject thereto, to his three other sons and daughters respectively, and in default of issue, which event has actually happened, to Lady Milltown for life.

The first estate tail in the events which happened is vested in a

All the limitations are out of the inheritance, and are subject to the term of 500 years, and therefore all take subject to the term, which the term was created to secure. Lady Milltown is in possession of a tenant for life; as such she is bound to keep down the interest on incumbrances, and amongst others, on that portion of the estate which the personal estate should be insufficient to pay. It is said that her estate for life is of less value than the interest of 2,000 *l.* a year. There is nothing in the will of the testator to exonerate her life estate from the payment of the interest charges.

The case of *Lyddon v. Lyddon* (b) has been cited as applicable to the present case. So far as that case goes, it is an authority in favour of the plaintiff now made against the life estate of Lady Milltown. The object of the payment of the principal did not amount to a postponement of the payment of the interest. But the case was decided, not for the point decided in it, but for the observation of William Grant, that 'if indeed the estate had been limited to

(b) 14 Ves. 558.

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Castlecoote, should be paid during the life of the Countess of Milltown out of the rents, issues, and profits of the lands and premises devised to her for her life, she and her husband appealed to this House.

Mr. *Pemberton* and Mr. *Lynch* for the Appellants:—The suit in which this appeal originated was instituted, first, for administering the will of Charles Henry, Lord Castlecoote, and was afterwards revived and amended for administering the will of his son, Eyre Tilson, Lord Castlecoote, who took considerable personal property under his father's will. The surplus of the father's estate, after payment of his debts and legacies, became part of the fund for payment of the son's debts and legacies. The personal estate of the latter is found sufficient for payment of his debts, and of such of his legacies as he directed to have priority over others, and to be raised and paid in any event. They were the legacies to Lady Castlecoote, now Countess of Milltown, Maria Meredith, Mrs. O'Reilly, and Messrs. Gore, Brooke, and Hawkesworth, and the charitable bequest to the most reverend Dr. Murray, amounting altogether to the sum of 11,700 *l*. The personal estate being insufficient for payment of

her (the wife) for her jointure, it might be argued that the limitation for maintenance could not take effect until the term should come into possession.' The further observation of Sir William Grant is material: he says, 'but where the trustees have the legal right to the rents and profits, and interest is expressly given for maintenance, until the portions should become due and payable, it would be equally contrary to the words and spirit of the settlement to hold that the maintenance should not take place until after the death of the mother.' (c) There the trustees have the legal right to the rents and profits, and the interest is given on the legacies; and I say, in this case it would be equally contrary to the spirit and intention of the will that the interest on the legacies, which the personal estate is insufficient to pay, should not be kept down during the life of Lady Milltown."

the other legacies, which amount to the sum of 14,400*l.*, they are admitted to be a charge on the real estate, but not to be raised until after the death of the Countess of Milltown, who, in the events that happened, is tenant for life of the lands. There is no question that if the personal estate were sufficient, all the legacies would be payable out of it, with interest, from the end of a year after the testator's death. But, in consequence of the insufficiency of that fund, the payment of the legacies becomes a postponed charge on the real estate, and one of the questions in the appeal is, whether the payment of interest on them is not also postponed till after the death of the Countess of Milltown, when the legacies themselves become payable.

The Appellants submit, in the first place, that the decree of the Court below, in declaring that the interest of the unpaid legacies shall be paid during the life of the Countess of Milltown, out of the rents and profits of the lands devised to her for life, is at variance with the plain intention of the testator. There is no provision in the will for payment of the interest or principal of these legacies out of the real estate during her life, and the construction put upon it by this decree, in effect, strikes out of it the express postponement of the charge of the legacies on the real estates until after her death. It is solely by the term of 500 years that the real estates are charged with legacies, and the trustees of the term are directed to effectuate that charge after the Countess of Milltown's death. The term, which alone can form an auxiliary fund for payment of the legacies, cannot be resorted to, nor can the trusts for that purpose be executed during the life of the Countess of Milltown, and the will provides in no other manner, nor by any

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other means for the payment of the legacies in the event of a deficiency of the personal estate. The Appellants further submit, that the decree declaring interest to be paid on the unpaid legacies during the life of the Countess of Milltown, out of the rents and profits of the lands and premises devised to her for life, is contrary to the manifest intention of the testator, which appears in his will to be, that she should have the full rents without any deduction therefrom, on account of either the principal or interest of the legacies.

The chief question for your Lordships' consideration is, not only whether these legacies bear interest at all, before they become payable, but also whether, if they do, the interest is to be raised out of the Countess of Milltown's life estate, or out of the reversionary term? As to the first part of the question, the general rule is, that interest is payable only for delay of payment of the principal, whether debt or legacy, and until the time for payment of the principal arrives and payment is delayed, no interest arises. There are only certain exceptions to this rule, as in the case of children taking under the wills of their parents: *Crickett v. Dolby* (a), *Mitchell v. Bower* (b). Now by the will in this case, and also by the decree, the time for payment of these legacies is declared to be after the death of the Countess of Milltown. The legacies not being payable until after that event, by the testator's own direction, it cannot be held to have been his intention that they should bear interest before the same event; and considering that these legacies are charged on real estate, your Lordships will not apply to that estate the rules that are applicable to personal

(a) 3 Ves. jun. 10.

(b) Id. 283.

estate, which would unquestionably be liable to interest. It is a general rule in these cases, that where a sum of money is charged by deed, or a legacy by will, on real estate, or on real and personal estate together, and the party, in whose favour the charge is created, dies before the day of payment, the sum so charged is not to be raised for his representatives, but sinks in the land; and the reason given is, because equity, following the rule of the common law, will not load the heir for the benefit of executors: *Duke of Chandos v. Talbot* (c), *Prowse v. Abingdon* (d).

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The next question is, in case your Lordships should be of opinion that these legacies ought to carry interest before they are payable, whether the interest is to be raised out of the rents and profits of the estates to the prejudice of Lady Milltown's life interest, or it is to be postponed until the time of payment of the legacies. There is no direction in the will to raise interest on the legacies in the event which happened. Had there been children, interest of their portions would be raised by way of maintenance, for that is an established rule; and the will in this case also directs, that in case any of the younger children should attain the age of 21, or (if a daughter) should marry in the lifetime of the testator's wife, the portion of such child should be a vested interest, and therefore it would carry interest. The postponement of payment of interest till after lady Milltown's death would not defeat the general legatees, for should they be held entitled to it, they can have it out of the reversionary term. The allocation of the term in the beginning of the will did not make it antecedent to Lady Milltown's

(c) 2 P. Wms. 601, see p. 610; see also *Powell v. Grigby*, ante, vol. 3, p. 103.

(d) 1 Atk. 482.

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life interest, for in the subsequent part of the will the testator directed the legacies to be raised out of the trusts of the term, and these trusts were not to be executed until after Lady Milltown's death. The words are, "And upon this further trust, that in case my personal estate shall be found insufficient for the payment of my debts and several legacies and charitable bequests, which shall, under the provisions of this my will, take effect and become payable, then that they (the trustees of the term) do and shall after my decease, and after the decease of my said dear wife, by demise, sale, &c. of the hereditaments and premises comprised in the said term, &c., or by and out of the rents, &c. raise such sums of money as shall be sufficient to discharge the said bequests or legacies, or such of them respectively as shall become payable under this my will." Assuming that the wife's life estate is antecedent to the execution of the trusts of the term, courts of equity will be justified by a long series of cases, in postponing the raising of interest on the legacies out of the real estate to the time when such legacies actually become payable: *Stanley v. Stanley* (e), *Hall v. Carter* (f), *Crickett v. Dolby* (g), *Codrington v. Lord Foley* (h), *Lyddon v. Lyddon* (i), *Lowndes v. Lowndes* (k), *Raven v. White* (l), *Davies v. Davies* (m), *Freeman v. Simpson* (n).

Mr. *Knight* said, he and Mr. *Corry* were for Mr. *Eyre Coote*, and Mr. *Tinney* was for the rest of the Respondents.

(e) 1 Atk. 458.
 (f) 2 Atk. 355.
 (g) 3 Ves. jun. 10.
 (h) 6 Ves. 364.
 (i) 14 Ves. 558.

(k) 18 Ves. 301.
 (l) 1 Swans. 553.
 (m) Daniel, 84.
 (n) 6 Sim. 73.

The *Lord Chancellor*, after observing that the practice at this bar was to hear not more than two counsel on a side, asked if the Respondents had adverse or conflicting interests.

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Mr. *Knight*:—The Respondent, Eyre Coote, submits that, if any interest is payable to the legatees out of the real estate, of which he is tenant in tail, the decree is just and proper in directing it to be paid out of the rents and profits during the life of the Countess of Milltown; but should the House be disposed to alter that part of the decree, and throw the accumulations of the interest, during Lady Milltown's life, on the inheritance,—which is not very probable,—then it would be for Mr. Eyre Coote to consider whether he ought not ask leave to present a supplemental appeal. However, as all the Respondents concurred in supporting the decree, generally, Mr. Tinney and himself only would address their Lordships.

Mr. *Knight* then proceeded on behalf of Mr. Eyre Coote:—This is an extraordinary will; the difficulty in the construction of it arises partly from the use of technical language inartificially applied, which always produces confusion; and partly from the miscopying of the draft. For instance, the word “bequests,” instead of “debts,” in one part, is evidently a mistake of the copying clerk; and, by a like mistake, no doubt, the words “and after the decease of my dear wife,” were copied from the trusts for raising children's portions into the direction to the trustees in a subsequent part of the will, “in case the personal estate should be found insufficient for payment of debts and legacies and charitable bequests, to raise by demise or sale, &c., of the premises comprised

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in the term, or out of the rents and profits, such sum as would be sufficient to discharge the said 'bequests' (debts) or legacies." In the last clause of the will, where the testator again charges the premises comprised in the term with his debts and legacies, for discharge of which the personal estate might be insufficient, he does not postpone the raising of the same to the death of his wife. By the well-known rule of law the will cannot be altered by striking out words and substituting others, but reading it as it is, it may be construed rationally, considering each part with reference to other parts and to the whole, as this House did in the case of *Langston v. Langston* (o). In the will in that case, among the limitations to first and other sons, the word "first" was omitted in one material clause, but this House supplied that omission from other parts of the will.

The arguments addressed to your Lordships in behalf of the Appellants, apply as well to the testator's debts as to his legacies. They say that interest was to accrue on them if there had been issue of the testator living at his death; but that it was not to be raised until after the death of Lady Milltown. Now as to the debts, most certainly, payment of them or interest on them could not be postponed; and as to the legacies, according to the argument for the Appellants, on the supposition that there had been issue of the marriage, and that Lady Milltown survived such issue, the accumulations of interest on the legacies during her life, together with the legacies themselves, would fall on the estate of the next tenant for life, and render it utterly valueless, a result which the testator could not have intended.

(o) 2 Clark & F. 194.

The legacy of 4,000 *l.* to Miss Meredith was directed to be paid in one year from the testator's death, with interest. The next legacy, of 3,000 *l.*, to Mrs. O'Reilly, was given to the executors, and they were directed to vest it in Parliamentary Stock, and pay her the dividends for her life. These two legacies, as well as that of 2,000 *l.* to Lady Milltown, were expressly given to bear interest from the testator's death. The mention of interest on these legacies, notwithstanding the omission of it in respect to others, supports and strengthens the case for the Respondents. It is not disputed, that, if the personal estate were sufficient, interest would be payable out of it on all the legacies; but it is contended that it is not payable out of the real estate, though expressly charged with payment of the legacies. Lady Milltown may live for many years, and if the interest as well as the principal be postponed to her death, the legatees will derive no benefit from the testator's bounty, but it will all go to their representatives, most of whom may be strangers to the testator. The argument for the Appellants admits that interest on the unpaid debts and legacies is now running. It admits that the portions for younger children, if there were any, would carry interest, but it is said that payment of it, after they should have attained the ages of 21, or be married in the case of daughters, would be postponed till after Lady Milltown's death. The consequence would be, if that is a sound argument, that the charges on the lands, should Lady Milltown live to be old, would amount to an absorption of the inheritance. The argument for the Appellants is opposed to the decisions in the cases of *Codrington v. Lord Foley* (p), and *Lyddon v. Lyddon* (q), which were cited in support of it.

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(p) 6 Ves. 364.

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Mr. Eyre Coote is specially interested in this part of the case. He is the first tenant in tail in the event which happened, and in order to protect his inheritance from the accumulation of interest on the debts and legacies, he may have to ask your Lordships' permission to present a cross appeal, unless your Lordships can, in this appeal, express an opinion on the question. It is submitted with confidence, that it cannot be collected from any passage in the will that it was the testator's intention that any interest, during the life of the Countess of Milltown, on such part of the debts and legacies as his personal estate might be insufficient to discharge, should be paid otherwise than out of the rents and profits of the real estates charged by the will.

Mr. *Tinney*, for the rest of the Respondents:—The testator directed that all the legacies bequeathed by his will should, from the time they respectively became payable, bear interest at the rate of 5 *l.* per cent. per annum, and be raised and paid accordingly; and he charged such part of them, as his personal estate should be insufficient to discharge, upon the lands and premises comprised in the term of 500 years, which is precedent to the life estate of the Countess of Milltown. The question of interest on the legacies, might be tested by the clause of the will containing the trusts for raising portions for younger children. No Court of Equity could refuse to give interest for the maintenance of younger children (if there had been any) under these clauses, after they attained the age of 21 or married, during the life of Lady Milltown, although the will was silent as to any provision for them during that period. So also the gifts of the unpaid legacies omitted to direct interest on them.

That omission at least might be supplied, and give interest to the legatees, as it would most undoubtedly be given to the children on their portions. It was evident that the testator contemplated leaving issue living at his death, in which event Lady Milltown's annuity of 2,000 *l.* could not be in the slightest degree affected by giving interest on the portions and legacies; for the rents and profits were more than sufficient for all the purposes, being somewhat more than 4,200 *l.* a year.

By the Appellants' construction of the will, the interest, expressly given on the legacies to Miss Meredith and to Lady Milltown herself from the testator's death, would, on the deficiency of the personal estate, be paid out of the trusts of the term, but could not be raised, as they alleged, until after Lady Milltown's death. That construction would be absurd, and therefore required no further answer. The testator directed some of his legacies not to be paid, except in the event of his dying without issue; they were general gifts, and vested and bore interest after the event happened.—[The *Lord Chancellor*: Do you maintain that the trustees had power under this will, to raise the interest out of the real estate during Lady Castlecoote's life, if there had been a son, tenant in tail?—There was some difficulty in answering that question. That event not having happened, attention was not given to it. The interest of the debt was not postponed. There were no trusts for debts, but only for legacies and portions. It was not easy to understand for what purpose the cases of the *Duke of Chandos v. Talbot*, and *Prowse v. Abingdon*, were cited for the Appellants, for they were not at all applicable to this question. The cases of *Bayley v. Bishop* (r), and *Freeman v. Simpson* (s), were directly in point.—[Lord

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(r) 9 Ves. 6.

(s) 6 Sim. 75.

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Brougham: At what period did the legacies become payable? Do you say they became payable at the end of a year from the testator's death?—The Respondent legatees submitted that they did, and the two cases just referred to were quite decisive on the question. The three legacies to the two trustees and Mr. Hawkesworth, were payable at the expiration of the year, out of the personal estate, but if that fund was not sufficient, then out of the real estate. The moment that the personal estate was found insufficient, then the real estate was to be resorted to: *Freeman v. Simpson*, *Lyddon v. Lyddon* (t). The Respondents were general legatees, entitled to interest at the end of a year from the testator's death, in case there was default of payment of the legacies at that time. Lady Milltown had an annual income of 3,400*l.* out of the estates, after deducting the interest on the legacies, and she was in a much better situation than if she had only the rent-charge of 2,000*l.* The interest ought clearly to be charged on her life estate, and regularly paid out of the rents and profits.

Mr. *Pemberton*, in reply, said the arguments for the Respondents consisted of general propositions, which no one denied. He had in his opening referred to the cases of *Codrington v. Lord Foley*, *Freeman v. Simpson*, and *Davies v. Davies*, to show generally, that interest on legacies is payable out of the personal estate from the moment the legacies become payable, but not so out of the real estate. In this case the payment of the legacies is expressly postponed, so consequently is payment of the interest. The same rules do not apply to payment of interest out of real and out of per-

(t) 14 Ves. 558.

sonal estates. The distinction is stated in the cases referred to.—[The *Lord Chancellor*: What is your construction of the clause for the maintenance and education of the children, if there had been any?]—The testator expressly directed interest for their maintenance until they should attain twenty-one, or marry, but after that period, that will made no provision for them before Lady Milltown's death, unless the meaning of the clause can be extended. By the will, the debts and legacies are to be raised out of the real estate, the personalty being deficient. It is not necessary to raise them at the same time; it is just to pay debts at the debtor's death, but the carrying into effect the directions of his bounty may be postponed.

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The *Lord Chancellor*.—The subject of appeal in this case, was that part of the decree of the Court of Chancery in Ireland, by which it was directed that the interest which should accrue upon the unpaid legacies of Eyre Tilson, Lord Castlecoote, should be paid during the life of the Appellant, the Countess of Milltown, out of the rents and profits of the lands and premises devised to her for her life. The will which gave rise to this question is very inaccurately drawn, and therefore occasions great difficulty in coming to a satisfactory construction as to that part of it which constitutes the subject of this appeal to your Lordships. The outline of the will is this:—The testator gave all his real, freehold and leasehold estates to certain trustees, to the use of other trustees for a term of 500 years, upon trust, out of the rents and profits, or by sale or mortgage, if there should be issue of the marriage of himself and Lady Castlecoote, to raise a sum of 2,000 *l.* per annum for his wife for her life, with a power of

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distress and entry for non-payment; and if there should be any younger children at the testator's death, then the trustees of the term were, after the decease of his wife, by sale or mortgage, to raise portions for such younger children, that is, 10,000*l.* if there should be but one younger child, to be paid and payable at such time as Lady Castlecoote should appoint, and in default of such appointment to be paid to such child, being a younger son, at the age of twenty-one, or being a daughter at the age of twenty-one, or marriage; and if there should be more than one younger child, then 20,000*l.* were to be raised for their portions, to be paid to them in such shares and at such times and ages as the wife should appoint, and in default of such appointment, to be paid in equal shares to sons at twenty-one, and to daughters at twenty-one or marriage, if the same should happen after the death of the wife; but if they should attain their ages or be married in her lifetime, then the portions should become vested interests in them, but payment should be postponed until after the death of the testator's wife, unless she should otherwise direct; and upon further trust, out of the rents and profits, to raise such sum as would be equal to five per cent. on the said sum of 10,000*l.* or 20,000*l.*, for the maintenance and education of the children until such time as their portions should become payable. After the provision for portions for younger children comes this direction, which gave rise to the question now pending for your Lordships' consideration: "And upon this further trust, that in case my personal estate shall be found insufficient for the payment of my debts and several legacies and charitable bequests, &c.," then the trustees of the term, after the death of his wife, were, by sale or mortgage, or other disposition of the lands comprised in the

term, or out of the rents and profits thereof, to raise a sufficient sum to discharge the said bequests and legacies. Then came a direction, that the trustees of the inheritance (there being none) were to join with the trustees of the term for the purpose of raising those sums of money, and subject to the term and to the charges which might be raised upon the term, the limitations of the will were to the first and other sons in tail male, then to the daughters in tail; and if no issue should be living at the death of the testator, then to Lady Castlecoote for life, with remainder to other persons in the will mentioned.

The testator gave several legacies, some of which were directed to be paid at all events; some were made to depend upon the event of his having no children at the time of his death; some of those legacies were directed to be paid with interest, to commence from the time of his death, and some were to be invested for the purpose of securing an income to certain persons then *in esse*, &c. He then gave a direction in these terms, "that all the legacies hereby bequeathed shall, from the time they respectively become payable, bear interest at the rate of 5*l.* per cent. per annum, and be raised and paid accordingly." Then he gave a sum of 2,000 *l.* to a charity, and he gave 2,000 *l.* with interest at five per cent., from his decease, to his wife Lady Castlecoote, the same to be paid to her in any event, and the residue of his personalty he gave in trust to pay his debts and legacies; and if the same should be insufficient, he charged the estates, lands, and premises, comprised in the 500 years' term, with the payment of his debts and legacies; and he directed the trustees of the 500 years' term to raise the same pursuant to the trusts vested in them for that purpose.

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and, subject to the payment of his debts and legacies, he gave the residue of his personalty to his wife.

The difficulty in the case arises from the previous direction in that part of the will in which the testator provides for the payment of debts and legacies, and directs that the trustees of the term shall, if the personalty is insufficient, raise the same, after the death of his wife, out of the rents and profits, or by sale or mortgage of the lands comprised in the term.

There are three different states of circumstances which the testator appears to have contemplated; and in order to arrive, as far as it is possible, at the intention which he wished to be carried into effect, it may be proper to consider what would be the state of the property according to those various states of circumstances which might have occurred. He might have left several children, which is one of the events for which he provides; or he might have left one only child, who would have succeeded to the estates; or that event might have taken place, which it is clear he contemplated, and which actually did take place, namely, that of his dying without any children.

Taking the first of the various suppositions which the testator had in his contemplation, namely, that of his dying, leaving several children, the effect of the disposition in that case would be, that the term of 500 years would be vested in the trustees; in the first place, to pay 2,000*l.* a year to Lady Castlecoote, and then to raise the portions for younger children after her death; for the period of raising them is postponed until after her death, in the same way as the raising of money to pay debts and legacies is postponed until after the same event. These portions for younger children are made payable at such times as the wife should direct, or at twenty-

one, or marriage, but not to be raised until after her death, unless she should otherwise direct. Then there is a provision for their maintenance till twenty-one or marriage, and there can be no doubt that, if there had been younger children, the real estate during the lifetime of the widow must have borne the charge of the maintenance, or interest by way of maintenance, for those younger children. Then subject to those charges, and subject to the question whether the debts and legacies, or the amount necessary for the payment of debts and legacies, would also bear interest, the first or eldest son was to be tenant in tail. If your Lordships could look to the result of the account, which, strictly speaking, I apprehend you cannot, we are told there would be found a considerable surplus; but your Lordships have a right to look to that which the testator clearly contemplated on the face of his will, namely, there being a surplus beyond those particular charges; for he makes the eldest son tenant in tail, subject to those charges. The son, if there should be such, is tenant in tail of the estate, subject to the payment of 2,000*l.* a year to his mother, subject to the provision directed to be raised for the maintenance of younger children, and also (if your Lordships should be of opinion that the legacies and debts bear interest) subject to the amount necessary to be raised for the purpose of meeting that charge of interest. Now, either the legacies bear interest payable from year to year, if interest be chargeable at all, or it would be chargeable on the sum necessary for the payment of the legacies and debts, and would accumulate against the inheritance of the estates; but, in the case supposed, the inheritance of the estates would be vested in the same person who was to be in possession of the surplus rents and profits, subject to the

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charges; and your Lordships would hardly impute to the testator the intention that his son should be in possession of the income arising from the estates, but that the interest on so much as was necessary to pay the debts and legacies should not be payable out of that income which the son was to be in possession of, but should be a charge accumulating during the life of his mother against the inheritance vested in that son, which would be enlarged by the termination of the life annuity which the testator had given to his wife. It is very important to look at this state of circumstances, although it never arose in point of fact, because we must see how the testator's supposed intention would operate under different circumstances, which he appears to have contemplated in his will. If interest was payable at all—a subject to which I shall presently call your attention—I can hardly suppose a doubt to exist that the interest to arise from year to year upon the sum necessary to pay debts and legacies would be to be paid out of the income of which the son would have been in possession as tenant in tail, and that it would not be a sum to accumulate against the enlarged inheritance at the period of his mother's death.

I have now called your Lordships' attention to one state of circumstances which the testator contemplated, and which, from the then state of his family, was likely to happen. Another event is that of there being only one son. Then there would be this difference, that the estates would not be charged or chargeable with the portions of younger children. The estate which the son would be in possession of during the lifetime of his mother, would be an estate subject to her jointure of 2,000*l.* a year, but not to be diminished by any maintenance payable for the younger children.

There is one other state of circumstances which the testator evidently contemplated, which is that which did happen; namely, the event of his dying without any children. In that event the direction is, that the widow shall be tenant for life in lieu of the son, but subject of course to such charges as the testator had imposed upon that term, which, in the first place, he vested in the trustees. The difference then would be this, the widow is put by the testator in the place of the son, as far as concerns the beneficial enjoyment, and also subject to the charges which he thought fit to impose; there are no portions payable to younger children, therefore there is no interest payable by way of maintenance for their support. The question is, whether the debts and legacies remain the same in all their qualities and incidents? If interest on the debts and legacies be payable out of the income of the estates, upon the supposition of there being children, whether two children or only one, is it to be supposed that the testator intended that when the interest of the widow was enlarged by the failure of those other objects, who, if they had existed, would have taken that which the testator intended for their benefit, the provision, which in the former case was made for the legatees and creditors, should be taken away? That seems very improbable. If, therefore, your Lordships are of opinion that, supposing there had been a son, a tenant in tail, that son in possession of the tenancy in tail, subject to the jointure to the widow, would, out of the surplus rents and profits, be bound to pay the interest becoming due upon the amount of the legacies and debts, it appears to me to follow, as an inevitable consequence, that your Lordships cannot impute to the testator the extravagant intention of taking away from the creditors

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and legatees, when the objects of the precedent trusts have failed, that provision which he intended they should have if there had been a son and younger children, who would then have claimed against the estates.

Upon these various views of the testator's intentions—although the words which postpone the raising of the legacies are to be found on the face of the will, which certainly create extreme difficulty—it appears to me that the decree of the Court of Chancery in Ireland has given the construction which best effects the intention of the testator. If interest is payable upon the amount necessary to pay the debts and legacies in the other events contemplated, it is surely payable in the event which has taken place, namely, that of there being no children; and it appears sufficiently clear that it must have been payable out of the surplus rents, if there had been children, for the widow would then have only a jointure of 2,000 *l.* a year, the estate-tail being vested in the son.

But it is argued, that no interest is to be paid on the legacies, upon the ground that the period for raising the sum of money for the purpose of paying the debts and legacies, is, by the terms of the will, directed to be postponed till after the death of the widow. The ground on which this argument is raised is, that interest is only payable on account of delay in paying that which is due and payable, and that inasmuch as there is no personal fund out of which those legacies can be paid, at least no fund adequate to the payment, the period at which they will become payable will not arise till after the death of the widow, and that consequently, there being no delay of payment beyond the proper period, no interest is payable upon the amount of the legacies. That argument would apply, and would have great force and weight, if

there had been no gift of a legacy, independent of the direction to raise it out of the estates after the death of the widow, but there are substantive and distinct and independent gifts of legacies. The testator has given legacies, in the first place, without reference to the fund out of which they are to be paid ; he has given legacies, some of which are in terms directed to bear interest from the day of his death, others are directed to bear interest from the end of a year. Now, all legacies, unless there is a direction to the contrary expressed in the will, are entitled to bear interest from the expiration of one year after the testator's death. All the legatees, therefore, under this will, where no specific time of payment is mentioned, are entitled under the will to receive certain sums of money, payable at the expiration of one year after the testator's death. It is part of the legacy ; it is part of the bounty which he has given, that interest is to be calculated for the benefit of the legatees, from the time when the legacies are payable. The legacies were payable, by law, from the expiration of a year after the testator's death, and interest upon these legacies would constitute as much a part of the legacies as the principal money intended by the testator to constitute the legacies themselves. If that were not so, your Lordships must be aware that in various cases which have occurred, in which legacies or portions have been raised by the sale of a reversionary term, interest never could have been calculated upon them at all. Now it is admitted at the bar, and it is clear upon the authorities which were referred to, that interest is calculated on portions, although the term on which they are secured is a reversionary term. In the case of *Codrington v. Lord Foley* (u), Lord Eldon laid down,

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that it is no objection to interest being calculated upon portions that the term is reversionary, that we are always to look at the intention of the testator appearing upon the face of the will, and if it thereby appears that interest is to be calculated upon the portions, it is no answer to such a construction of the will that the term out of which they are to be raised is a reversionary term. The case of *Lyddon v. Lyddon* (v) appears to me quite conclusive upon the subject, and is directly applicable to the present case. There the portions were directed not to be raised until after the expiration of the life-estate. But there was a term out of which they were to be raised. That term, vested in trustees for the purpose of raising the sum necessary to pay the portions, was not a reversionary term, and Sir William Grant made some observations as to what might have been the effect if the term had been reversionary. The case of *Codrington v. Lord Foley* decides that such a circumstance of itself is not decisive against a legacy being chargeable with interest. But in *Lyddon v. Lyddon*, the term being vested in trustees, although there was a direction not to raise the sum necessary for paying the portions till after the death of the father and mother, Sir William Grant decided that interest was to be paid from the death of the father, and before the portions themselves were payable. The doctrine so laid down in *Lyddon v. Lyddon* was followed in the late case of *Freeman v. Simpson* (w). In that case a legacy was directed to be paid out of the real and personal estate. The personalty being insufficient for that purpose, the Vice-Chancellor decided that the legacy, with interest from the end of a year from the testator's death, was to be raised out of the real estate.

(v) 14 Ves. 558.

(w) 6 Sim. 73.

Looking, therefore, at the various events which the testator contemplated; looking at the absurdity of holding that the interest is to be raised, and is to accumulate against the inheritance, when the remainder-man should be in possession of the estate; and considering the authorities which have been cited upon this subject, though it is not perhaps possible to make every part of this will reconcilable with other parts, I think your Lordships will concur with me in the opinion which I have very distinctly formed, that you will be carrying the testator's intention more certainly into effect by affirming the decree of the Court below, than you can do by any variation of it; and I therefore move your Lordships that the decree be affirmed.

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Lord *Brougham*:—I entirely agree in the view taken of this case by my noble and learned friend. In common with the other noble and learned Lords who heard this appeal, I entertained very considerable doubt during one part of the argument, arising from that very remarkable provision—from which, indeed, the whole difficulty arises—that the legacies shall not be paid till after the decease of the testator's wife. But, upon further consideration of the case, we felt that that difficulty could be removed, and that, upon the whole, the sound construction of this will, which is so inartificially penned, is that which has been put on it by the decision of the Court below; and, therefore, that this judgment ought to be affirmed. At the same time, I take it for granted that this is not a case in which your Lordships would at all be disposed to give costs against the Appellants. There was difficulty enough in the case to make the step that was taken of appealing quite justifiable.

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Lord *Wynford* :—I agree with both my noble and learned friends, that the decision of the Court below is the proper one, and it would be a melancholy thing if it was not. If the interest is accruing now, but not to be raised till after the death of Lady Castlecoote, now Lady Milltown—who, I believe, is still young—the consequence of reversing this judgment would be, that this estate, which it was the intention of the testator should be possessed by Mr. Coote, for the purpose of supporting him in his dignity, would, in fact, be worth nothing : it would be eaten out by the legacies. On the other hand, if the interest was not payable at all, the legacies would be worth nothing, for probably the legatees would not come into the possession of the legacies for fifty or sixty years. It is, therefore, desirable to come to the construction that the interest is payable now, there being a fund out of which it can be paid, namely, out of the rents of the estates ; but that the principal sum for the satisfaction of the legacies is not to be raised.

All the cases which have been decided on this subject have been to this effect, that where a legacy is given to be paid at a distant period, interest is generally payable upon that legacy in the meantime. But that is not the case in the present instance, as it is alleged, because these legacies are payable in the first instance out of the personal property, which being insufficient, the real estate is charged. The testator probably considered the personalty abundantly sufficient to discharge all these legacies ; and if it had been sufficient, the legacies would have been payable within one year after the testator's death. Then the testator, in this very loose will—for I never saw a will more loosely drawn—says the legacies are to bear interest at the rate of five per cent. from the time when they are payable. When

did he consider these legacies to be payable? I say he contemplated, in the first instance, that they would be paid out of the personal property. If there had been personal property sufficient, they would have been payable within a twelvemonth from the testator's death, and interest at five per cent. would have been chargeable in that case from the end of twelve months. It appears to me, therefore, that the introduction of these words—whether they were introduced by accident or not—that the principal was not to be raised till after the death of the widow, should not postpone the payment of interest on these legacies till after her death.

There is a very important circumstance, which I believe my noble and learned friend relied on in giving his judgment in the Court below, namely, that, as there is a fund in the hands of the trustees, there is a power given to pay the interest out of the rents of the estates. The rents of the estates are in the hands of trustees from the moment of the testator's death; therefore, I think it must have been the intention of the testator that the interest upon the legacies was to be paid out of that fund. If these words, upon which this question arises, had not been introduced, I should have thought that the principal of the legacies was to be paid within a very short period after his death. These words compelled my noble and learned friend to introduce into his decree that which he was bound to introduce, that, although interest is payable from the end of twelve months after the death of the testator, the principal is not to be paid off, by the express words of the will, until after the death of Lady Castlecoote.

It appears to me that this judgment pronounced in the Court below, is according to the true construction of this will, as far as it is possible to find out what is

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the true construction of a will so ill drawn and so inconsistent. In a case of great doubt, and where it is impossible to find out with certainty the testator's meaning, we must adopt that construction which is according to law and justice, which will preserve the interests of those for whom the testator meant to make an immediate provision, and preserve the estates for him who was to take the benefit of them after the death of Lady Castlecoote. I therefore concur in the opinion of my noble and learned friends, that this appeal should be dismissed, but that from the difficulties of the case, and the great obscurity of the will, it ought not to be dismissed with costs.

Lord *Plunkett*:—This case has been so fully discussed by the noble and learned Lords who have preceded me, that it is scarcely necessary for me to address any observations to your Lordships upon it. To some of the proceedings in the Court below, however, I think it necessary shortly to call your Lordships' attention. It has been admitted, in the whole progress of this case, that so far as the personal estate is concerned, the legacies which have been charged upon it do in their nature carry interest, and by the express terms of the will, some of them are directed to carry interest from one year after the death of the testator. Whether or not interest was properly payable out of those estates during the lifetime of Lady Castlecoote, it is quite clear that upon her death the whole arrear of interest which would accrue in the mean time, would be a charge upon the inheritance. I advert to this part of the case, because in the course of the argument it was thrown out upon the part of the infant Respondent, Mr. Eyre Coote, who is interested in the inheritance, that it now becoming material for him, for the first time, to ascertain whether the inheritance

was so chargeable, your Lordships might, perhaps, be disposed to give him liberty to lodge an additional appeal for the purpose of protecting the inheritance, in order to prevent the possibility of further litigation. For this reason I think it necessary to call your Lordships' attention to the decree pronounced in this cause on the 20th of June 1833.

Mr. Eyre Coote, the father of the present Respondent, was the person under the will of Eyre Tilson, the second Lord Castlecoote, entitled to a life-estate in these premises. His son, the present Respondent, is the person now entitled to the inheritance; but when the cause came to hearing, in June 1833, previously to the final decree complained of, an exception was taken by Mr. Eyre Coote, the then tenant for life, upon this very point, viz. that no interest was chargeable at all. He excepted to the report made pursuant to that decree, namely, that the Master stated, "that the sum of 31,239 *l.* 19 *s.* 1 *d.* still remained due on foot of the unpaid debts and legacies of the said Eyre Tilson, Lord Castlecoote, for principal and interest, up to and for the 11th day of June instant; whereas, by the terms of the will of the said testator, interest on the said pecuniary legacies, or some of them, could accrue only from the time at which the said testator had by his will provided that the same should be raised and paid out of the real and freehold estates, and the said Master ought to report the principal money only of the said pecuniary legacies to be due to the several persons entitled to said legacies." That was the very point of the first exception taken by Mr. Eyre Coote. That exception was overruled, and the point was decided against him, as I find in looking to the abstract of the decree of the Rolls, of June 1833, in the Appendix. It is

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true that Mr. Eyre Coote, who raised that exception, was only tenant for life, and therefore that proceeding would not have bound the inheritance, if there was any ground now for raising this point by Mr. Eyre Coote, the Respondent. The tenant for life having died, the cause being revived against his son, the present Mr. Eyre Coote, it was referred to the Master, to see whether it would be for his benefit that he should be bound by proceedings against his father; and the Master having reported that it would be for the benefit of the minor that the several accounts and proceedings had in the original cause should be adopted on his behalf, the cause then came on to be heard in 1835, and the decree now appealed from was then pronounced.

Having adverted to these proceedings for the purpose of showing that no question can be now raised as to the liability of the estates, after the determination of the life-estate of Lady Milltown, to the entire interest then remaining due from the end of one year after the death of the testator, I shall only briefly state some of the grounds on which the order now appealed from was pronounced. It appears to me clear that the testator contemplated two different events; the first was his dying, leaving issue by his then wife, and the second was his dying, without leaving issue by her. In the first event, he gave her an annuity of 2,000 *l.* for her life, charged on the lands; in the second he gave her an estate for life in the lands. In both events he subjected the estates to certain legacies; in both he directed that the estates should not be liable to be sold for the payment of legacies, until after the death of his wife; but in both it was evidently his intention that the legatees should be entitled to interest on their lega-

cies, and that the principal and accruing interest should be charged on the term of 500 years.

It has been argued by the counsel for the Respondents, that the postponement of the raising of the principal of the legacies until after the death of the widow, was a mistake arising from the copying into the part of the will, which relates to the event of his dying without issue, the clause which could only have properly been applicable to the event of his leaving issue, in which case all difficulty would have been removed. But I conceive that I cannot take such a liberty with the express words of the testator. That condition has found its way into the will, and we must take it as we find it. But though it is clear that the raising of the principal of the legacies was to be postponed till the death of the wife, I do not find anything in the will which compels, or indeed warrants, the conclusion that the payment of the interest was to abide the same event. So far as the personal estate was concerned, it is clear the principal, as well as interest, was payable immediately. So far as the real estate is concerned, it has not been alleged in the Court below (only by the counsel for the Respondents here), that it is not to be ultimately liable, as well for the arrear of interest, as for the principal of the legacies. The point has been suggested by the counsel for the Respondent, Eyre Coote, as one to which he might resort, in the event of this decree being reversed, but for the reason which I have already stated, I am satisfied that such a point is not now open to him.

The only real question is, whether the interest, which is already a charge on the term, is now payable. If there had been a son, who would have become entitled to the estates, upon the death of the

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testator, subject to the annuity, that son would have been bound, as tenant in tail, to have paid the interest, though he would have been protected from having his estate sold for the payment of the principal, until it was relieved from the annuity to the wife. There was a large surplus, as appears from the report in the cause; and that surplus appears applicable to the purpose. There could have been no possible advantage to a son, tenant in tail, from leaving the accruing interest to cut into his inheritance, and it would have been unjust to leave the legatees, many of whom had only a life interest in the legacies, to await the death of the widow before they could take any benefit from them. It is further to be remarked that, on the construction contended for by the Appellants, if there had been younger children of the testator, they would have been left without any provision for their subsistence, from the time of their attaining twenty-one years, or marriage in the event of their being daughters. The only provision for such children was the provision directed for their maintenance, and there would be no provision in the event of their attaining twenty-one years, or, if daughters, after their marriage, if the construction contended for by the Appellants is the true construction. Now, if the mere postponement of raising the principal would not have induced such consequences in the event of the testator leaving issue, can it have a stronger effect in the event of his leaving no children? Is it to be supposed, that the testator intended a greater privilege against the payment of the interest in favour of his wife than he had attached to it in case of his son, or that he meant to deprive the legatees of the benefit of his bounty in the one event, and not in the other. There is nothing, as it appears to me, to show that the mere

postponement of the payment of the principal necessarily induces such a consequence, and the authorities referred to by the Noble Lord on the Woolsack go to show directly the reverse. There may be a good reason for the one, which would not apply to the other, as the falling in of leases, or the existence of any circumstances which would produce a personal inconvenience from an immediate sale. Here is the case of a term for years paramount to the estate devised to the wife, and charges for legacies made on it, in their nature carrying interest, and admitted to be such both as against the real and personal estates; what is to exempt the tenant for life from the ordinary obligation of keeping down the interest of charges affecting the inheritance? This is not like the case of a legacy, which is not to vest in the legatees until a certain event happens. It is a legacy given absolutely and directly, and with interest; but the power of levying the principal out of one of the funds charged with it, is postponed to a future period.

The authorities which have been cited at the bar, as to legacies payable in the event of the legatee's attaining twenty-one, or of marriage, do not apply; nor have the cases, as to the power of raising legacies or portions out of a reversionary term, any application to the subject. This is not a reversionary term, nor could a reversionary term be carved out of it; it is a present and a paramount term, and the case is, in my opinion, nothing more than the ordinary one of a tenant for life, called on to keep down the interest of a paramount charge on the inheritance, that charge in its nature carrying interest. It would require an intention to the contrary, clearly appearing on the will, to counteract this general rule; and there is not

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in this case anything to warrant even an inference that such was the intention of the testator, but, in my opinion, much to the contrary.

I agree fully in what has been said by my noble and learned friends who have gone before me, that this is a case upon which it was quite fit to take your Lordship's opinion. This will is a very inaccurate and ill-framed and perplexed instrument. After hearing the case very fully argued, I did not arrive at the conclusion without difficulty and hesitation. I concur, therefore, in thinking that this is a case in which no costs should be given.

Lord *Brougham* wished to inform their Lordships, that the other noble and learned Lord (Lord Lyndhurst), who was present at the hearing of the appeal, entertained the same view of the case that their Lordships had now expressed, but he was prevented from attending at this hour to express his opinion. He also had entertained some doubts during part of the argument, but they were afterwards removed.

It was then ordered that the decree complained of be affirmed, without costs.

A P P E A L

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FROM THE COURT OF CHANCERY, IN IRELAND.

Feb. 9, 10.
March 14.

ANNE HODGENS, otherwise WALKER, by }
O'GORMAN MAHON, her next friend - } *Appellant.*

THOMAS HODGENS, Esq., and HENRY }
WALKER HODGENS and THOMAS }
WALKER HODGENS, Infants, by the } *Respondents.*
said THOMAS HODGENS, their father }
and next friend - - - - - }

A ward of Court, entitled in her own right to large real and personal property, was married under age, and without the consent of the Court. That marriage was subsequently annulled. Upon her coming of age, the husband, after being guilty of several gross contempts of Court, petitioned to be at liberty to make proposals for a settlement of her property, and to have a legal marriage celebrated; undertaking to execute such settlement as the Court should direct, and to do whatever the Court should order for the ward's interest. The petition being granted, a legal marriage was solemnized, and proposals were laid by the husband before the Master, who approved of a draft of settlement, whereby all the wife's property was limited to her for life, for her sole and separate use, with power of appointment of part of it, and after her death to her children; but the Lord Chancellor declined making any order as to the execution of this settlement, the amount of the property not being ascertained. Of the second marriage there was issue, viz. two children. The wife afterwards eloped; the husband petitioned the Court for maintenance for the children out of her property, stating that his own means were not sufficient. **HELD**, that the children had no right in law or equity, during the life of their mother, to be maintained out of her separate estate, while their father was living.

Held also, that the proposed settlement, though not executed,

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having been acted upon by the Court by several orders, could not be varied, with reference to subsequent events.

THE Appellant was the only legitimate child of Henry Walker, a contractor for lotteries in Dublin, who died intestate, in March 1810. Being entitled, as his sole heiress-at-law and next of kin, to some real and very considerable personal property, and being then only three years of age, she was made a ward of the Court of Chancery in Ireland; her mother was appointed guardian of her person, and a Master in Chancery guardian of her fortune; who, by direction of the Court, filed a bill in her name, for an account of her father's real and personal estate, against the mother, his administratrix. The Appellant's uncle, Thomas Walker, also died intestate, and without lawful issue, in March 1817, and, as his heiress-at-law and next of kin with his two sisters, she became entitled to further property, real and personal, to a large amount. For an account of that estate also, the Master, the guardian of the Appellant's fortune, filed another bill in her name against Mrs. Wheeler and Mrs. Carr, the sisters and administratrixes of the uncle, praying that her rights in relation to that estate might be ascertained and declared. The property thus left by the Appellant's father and uncle was for a long time the subject of several suits in Chancery. In one of these suits Henry Walker, the eldest of four children of the Appellant's father and mother, before their marriage, attempted, unsuccessfully, to establish his claim, as heir-at-law of the father and uncle, to the whole of their real estates, and as next of kin with others, to a distributive share of their personal estates.

Mr. Hodgens, the Respondent, second son of a wealthy merchant in Dublin, was called to the Irish bar early in 1820, and happened to be consulted pro-

ssionally by Henry Walker in the matter of his suit. Having thus become acquainted with the situation and prospects of the Appellant, who, being then of the age of about thirteen years and a half, was placed at a boarding-school in Dublin, Mr. Hodgens obtained an introduction to her, by the favour of her mother, then married to a second husband. After paying two visits to the school, he succeeded in a few days, with the connivance of the mother, and the active assistance of the husband of her illegitimate daughter, in taking the Appellant, on pretence of an evening walk, to the dwellings of a degraded clergyman, who read the marriage ceremony for them, after which she was immediately conducted back to her school.

The guardian of the Appellant's fortune having received information of the marriage, applied to the Lord Chancellor(*a*), who, after examining several papers brought before him, made an order, dated the 1st of April 1820, for issuing attachments against Mr. Hodgens, the mother of the Appellant, and the clergyman, and they were accordingly committed to prison for the contempt. The Appellant was continued at the same school, the ladies who conducted it appearing to the Lord Chancellor to be free from blame in the matter; the mother was removed from the guardianship, and Roderick Connor, Esq., Master in Chancery, was appointed thereto in her place.

Mr. Hodgens was discharged from prison on the 14th of January 1821, in consideration of his health, which he represented, in a petition to the Lord Chancellor, to have suffered severely from close confinement; and upon promise not to hold any communication with the ward without leave of the Court, and upon his entering, with his father and brother, into recog-

(*a*) Lord Manners.

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nizances in the sum of 20,000*l.* But on the evening of the 21st of February 1821 the Appellant was missed from her school, and was found at the house of Mr. Hodgens. For this second contempt he was again attached and committed to prison, and kept there until the 20th of May in the same year, when he was discharged on his own recognizances, conditioned that he should not hold any communication with the ward without leave of the Court. In his petition to the Lord Chancellor for his discharge on this occasion, he again represented that close confinement was impairing his health, and would, if protracted, cause his death; that he had no sureties to join him in recognizances, his father and brother having withdrawn their countenances from him, and he “solemnly assured his Lordship that he did not, directly or indirectly, inform the minor of his recent discharge from prison; and that she, without his previous knowledge, solicitation, procurement, direction, or previous consent, came to his house on the said 21st of February, and continued there until next day.” The Appellant, referring to this petition, in an affidavit sworn by her in 1834—after unhappy differences arose between her and Mr. Hodgens—said that he did inform her of his return from prison to his residence, by letters conveyed to her by one of the servants at the school, who was bribed by him for that purpose; that he sent a man from his father’s employment, who brought her from the school to his own house; and that he detained her there until ten o’clock the next day, paying no attention to the many applications made to him to deliver her up in the course of the preceding evening.

The Appellant, having been again taken back to the school, remained there until the 14th of May

1822, when, as she was taking an evening walk by a place called Drumcondra Bridge, near Dublin, accompanied by other young ladies of the school and by her school-mistress, she was "forcibly taken," as she stated in her affidavit before mentioned, by a man employed by Mr. Hodgens for that purpose, and put into a postchaise, which Mr. Hodgens had waiting at the bridge. The account given of this escape by the schoolmistress, in her affidavit in support of an application for another attachment against Mr. Hodgens, was, that "a postchaise was standing at the bridge, and the door thereof being open, and Mr. Hodgens sitting therein, the minor left her arm to go therein; and as she (the schoolmistress) endeavoured to prevent her, a man, for the purpose of assisting the minor, got forcibly between them." The chaise set them down at the house of a provision merchant, and next day Mr. Hodgens, apprehending that he should be again committed to prison, resolved to go beyond the Court's jurisdiction. The Appellant, in the affidavit before-mentioned, stated that "he was put into a provision cask, having holes made therein to admit air, and forwarded in a dray with other casks, containing provisions, and put on board a ship then about to sail for London. She (the Appellant), also, was brought on board in disguise. After the ship had sailed Mr. Hodgens was let out of the cask." After arriving in London they went directly to Rotterdam, where they resided together for some months, and then proceeded to Paris, and resided there until after the Appellant attained her age of 21, which was on the 26th of September 1827.

A third attachment had been issued against Mr. Hodgens on the 15th of May 1822, but was not executed by reason of his having gone abroad; and it

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was never set aside. On the 22d of December 1822 sentence of nullity of the marriage of the 19th of March 1820, in a suit instituted for that purpose, by order of the Lord Chancellor, in January 1821, was pronounced in the Consistorial Court of the Archbishop of Dublin. The Appellant, according to her statement, was under the impression that she was the wife of Mr. Hodgens while living with him in France, and was not aware that the marriage was annulled, but she believed Mr. Hodgens was informed of it, as she afterwards discovered from a letter written by him to a correspondent in Dublin, stating that he would marry her only in the event of her succeeding in establishing her right to the property in litigation. Her right to the property was disputed by Mrs. Wheeler and Mrs. Carr, the sisters of her father and uncle, on the alleged ground of her illegitimacy.

Upon their return to Ireland in October 1827, after the Appellant had attained her age of 21 years, and her legitimacy was established by a verdict of a jury, Mr. Hodgens presented two petitions to the Lord Chancellor (Sir Anthony Hart); one of them in the name of the Appellant, stating, among other things, that she had attained her age, and praying to be discharged from her wardship; the second in his own name, stating some of the facts hereinbefore stated, and that he and Anne Walker (the Appellant) were desirous to have a valid marriage celebrated between them, and that he was willing to execute such deed of settlement of her property as his Lordship should direct, and to submit himself in every respect to his Lordship's jurisdiction, and praying for an order of reference to the Master or otherwise, as his Lordship should deem most suited to the honour and interests of the said Anne; he, the said Thomas

Hodgens, undertaking to do and perform whatever should be ordered by his Lordship in that behalf.

Upon this petition an order was made on the 28th of November 1827, directing that Mr. Hodgens should proceed to have a legal marriage duly solemnized between him and the Appellant, and that thereupon he should proceed to lay proposals before the Master, for a proper marriage settlement to be entered into, under the circumstances, in respect of the fortune of the said late minor; and it was further ordered, that the petition of the said late minor, to be discharged from wardship, should stand over until further order.

In pursuance of this order a marriage was solemnized between the parties on the 21st of December 1827, and Mr. Hodgens laid before the Master proposals, such as had previously been suggested by the Master, for a settlement of the wife's fortune. The Master made his report, bearing date the 6th of February 1828, and thereby certified that a marriage had been duly solemnized between Thomas and Anne Hodgens, and that Thomas Hodgens had laid before him proposals for a settlement of her fortune, whereby he proposed that the freehold estates, of which Mrs. Hodgens was then, or should at any time thereafter, during her coverture, become seized, should be conveyed to trustees for her sole and separate use, independently of Mr. Hodgens, and without the same being subject to his debts; and that the rents and profits thereof should be paid to her upon her own receipt, notwithstanding her coverture, and that after her decease the rents of the freehold estates should be settled to the use of the first and other sons of the marriage successively in tail male, remainder to the use of daughters as tenants in common in tail; and in default of issue of the said marriage, then to the

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use of such person and persons, for such estate and estates, and upon such trusts, as she, notwithstanding her coverture, by her will, duly signed and attested, should appoint ; and in default of such appointment, to the use of Mrs. Hodgens, her heirs and assigns. And as to the personal property to which she was then, or at any time thereafter, during her coverture, should become entitled, it was proposed that the same should be vested in trustees, in trust, to pay all necessary costs for the prosecution of the several suits which had been instituted on her behalf, and such costs as the Court might decree her or Mr. Hodgens to pay in any suit then instituted on her behalf, or in which she was a defendant ; but, in the meantime, upon trust to pay the interest and proceeds of the said property unto Mrs. Hodgens, for her sole and separate use, free from the control or debts of Mr. Hodgens ; and after payment of the said costs, then, as to the residue of the said personal estate, in trust to pay the interest and proceeds thereof unto Mrs. Hodgens during her life for her sole and separate use and benefit, free from the control or debts of Mr. Hodgens ; and from and after her decease, in trust for the child and children of the said marriage, in such shares and proportions (if more than one) as Mrs. Hodgens alone, notwithstanding her coverture, should by any deed, or by her last will, to be executed in the presence of and attested by two or more credible witnesses, direct and appoint ; and in default of such appointment, then in trust for such child and children, equally to be divided amongst them, if more than one, as tenants in common, with power to Mrs. Hodgens, by will executed and attested as aforesaid, to appoint any portion of the said personal property, not exceeding one-fifth part thereof, to Mr. Hodgens, in case he should survive her ; and with power, in case she should survive him and leave

any issue of the said marriage, who should become entitled to any benefit under the settlement, to appoint the interest of a proportion of the said personal estate, not exceeding 20,000*l.*, to the use of any after-taken husband; and to appoint that principal among any children she should have by such after-taken husband; but in case she should not leave any issue by Mr. Hodgens, who should become entitled to such benefit as aforesaid, then in trust for such person or persons, and in such shares, as she should in the lifetime of Mr. Hodgens by her will, or after his death either by her will or by deed, to be by her executed and attested as aforesaid, direct and appoint; and in default of such appointment then in trust for Mrs. Hodgens, her executors, administrators and assigns. And the Master further found that he had approved of said proposals and of a draft of a settlement pursuant thereto, but that he had postponed the engrossment of it until further order.

The Master, by his said report, further certified that there was then depending in the Court of Chancery the following suits, already mentioned, viz., a suit instituted on behalf of Mrs. Hodgens, during her minority, against Mrs. Blake or Walker, her mother, and administratrix of Henry Walker, the father of Mrs. Hodgens, in order to ascertain her rights as his only legitimate child, and that there was then in Court, to the credit of that cause, 1,836*l.* 9*s.* Government Three-and-a-half per cent. stock, and 128*l.* 11*s.* cash, but subject to certain claims of creditors of the said Henry Walker, not then finally adjudicated upon; and another suit, instituted on her behalf during her minority, against Elizabeth Wheeler and Lydia Carr, administratrixes of Thomas Walker, her paternal uncle, in order to ascertain her rights as one of his

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next of kin ; and that there was then in Court, to the credit of that second cause, 13,465 *l.* 16*s.* Government Three-and-a-half per cent. stock; 22,407 *l.* 12*s.* 6*d.* stock of the Governor & Company of the Bank of Ireland ; 538 *l.* 12*s.* 2*d.*, Government Four per cent. stock, and 1,131 *l.* 3*s.* 2*d.* cash. And the Master certified that the said several sums standing to the credit of both the said causes, with certain freehold property yielding 153 *l.* 3*s.* 10*d.* a year, were to be the subject of the said settlement, and the same were recited in the draft of settlement; and he further certified that there was depending the suit before mentioned, instituted by Henry Walker against Mrs. Hodgens during her minority, all which several suits were the suits for costs, whereof it was proposed to provide as in the said report and draft of settlement is stated and provided."

A petition was presented by Mr. Hodgens, praying that the report might be confirmed ; but it appearing to the Lord Chancellor that several persons had set up claims to part of the property which was to be the subject of the settlement, and that they were still undetermined, he declined, under the circumstances, to make any order on the report.

By an order made on the application of the Appellant, and dated the 13th of March 1828, a sum, equal to 2,000 *l.*, for an outfit for herself and Mr. Hodgens, was ordered to be transferred to her out of the stock which had been purchased from time to time, with the accruing dividends of the funds placed to the credit of the first of the causes before mentioned. And by another order, of the 13th of June 1828, a sum of 2,991 *l.* was transferred from the funds in that cause to the credit of one of the other causes, for the payment of certain debts or claims.

Upon petition subsequently presented by the Appellant, the Lord Chancellor made an order dated the 2d of August 1828, by which the Accountant-general was ordered to draw on the Bank of Ireland, in her favour, and upon her separate receipt, for the dividends and interest due and to accrue on the funds in Court, to the credit of the said several causes, constituting part of the property to which she was entitled, and which was to have been put into settlement pursuant to the proposals; and she accordingly received the dividends from time to time on her separate receipt.

By another order, dated the 13th of February 1829, made by the Master of the Rolls (*b*), with consent, on the Appellant's petition, the receiver of the rents of the freehold estates was discharged, and she was let into the receipt of them as her separate estate. And by an order, dated the 19th of May 1831, the sum of 1,698*l.* 10*s.* three-and-a-half per cent. of the funds in Court, was transferred to a Mr. Malley, to answer certain claims. And by an order dated the 21st of February 1832, the sum of 1,500*l.* of the same stock, was transferred to Mr. Hodgins for household expences, &c.

By a final decree, made on the 30th of April 1833, in the cause of *Thomas & Anne Hodgins v. Wheeler & Carr*, which was a revivor of the cause instituted in the name of the Appellant, when an infant, against the sisters of her uncle, her title to his freehold property was established, and she was declared entitled to one-third part of his personal estate.

By an order, bearing date the 10th of December 1833, and made by the Master of the Rolls, on the Appellant's petition in the several causes, the Accountant-general of the Court of Chancery was directed to transfer from the credit of the first and second

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causes, to the credit of the third cause (that last mentioned,) and to the separate credit of the said Anne Hodgens, the sum of 5,846*l.* 12*s.* 2*d.*, Government Old 3½ per cent. stock, 538*l.* 12*s.* 2*d.*, Government New 3½ per cent. stock, and 22,407*l.* 12*s.* 6*d.*, Bank of Ireland stock ; and, in execution of the said order of the 2d August 1828, to draw from time to time on the Bank of Ireland in favour of Mrs. Hodgens, on her separate receipt, for the dividends which should accrue due on the said several funds.

In March 1834 unhappy differences broke out between the Appellant and her husband. They had then two children, who are the infant Respondents, born since the marriage in November 1827. In the month of April 1834, the Appellant presented a petition to the Lords Commissioners for the custody of the Great Seal in Ireland, stating, among other things, the several orders hereinbefore stated, and that there remained then to the credit of the cause of *Thomas & Anne Hodgens v. Wheeler & Carr*, and to the separate credit of the Appellant, the several sums and stocks in the last order mentioned, and also 30*l.* 4*s.* 2*d.* in cash ; that, pursuant to the said orders of the 2d of August 1828, 13th of February 1829, and 10th of December 1833, the Appellant continued to receive the dividends on the said funds, and also the rents of the freehold estates, on her separate receipt ; that by some of the other orders before-mentioned, the amount of the personal property which was the subject of the settlement had been reduced ; that Mr. Hodgens had not executed the said settlement, and she apprehended he would not execute it, unless compelled by order of the Court ; that there was issue of the Appellant and Mr. Hodgens two sons, both born since the marriage in 1827, and subsequent to the date of the Master's report approving of the settlement ; that the Appel-

lant was advised that it was for the benefit of herself and her said children, that said settlement should be executed, and she submitted to the Court whether it was necessary that any alteration should be made in the recitals thereof, with reference to the reduction of the funds therein mentioned since the approval thereof by the Master, but was advised that such alteration was not necessary, if the settlement was to be dated as of the day on which it was so approved of, as it, in terms, provided for payment, out of the personal estate, of any demand thereon for costs or otherwise; and that she was also advised that it would be necessary to levy fines of the freehold property of the Appellant. The petition prayed that Mr. Hodgens might be ordered to join the Appellant in levying such fines, and to execute the said settlement, with such alterations therein, with respect to the amount of the Appellant's property (if any) as the Master might certify to be proper and necessary in consequence of the said orders; and that it might be referred to the Master to inspect the draft of settlement and the said orders, and to certify whether any and what alteration should be made in the draft in consequence of the orders; and that he might be also directed to approve of proper trustees to be named in the settlement; and that such proceedings might be had without prejudice to the aforesaid orders of the 2d August 1828, 13th February 1829, and 10th of December 1833."

Mr. Hodgens presented a cross petition on behalf of the children of the marriage, praying that a competent allowance for their maintenance and education, during their minority, and for their advancement afterwards, might be ordered out of the Appellant's property. In support of this petition several affidavits were filed, one of which was by Mr. Hodgens,

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whereby, after stating, among other things, several of the matters hereinbefore stated, deponent further said that previous to the marriage solemnized between him and the Appellant in 1827, an interview took place between her and Master Connor, her guardian, and Master Connor told her that she was then free to marry deponent or not; and that she replied that in consequence of deponent's affection and kindness to her during the five years they resided abroad, she was determined to re-marry him. After stating the various suits instituted in respect of the property left by the father and uncle of the Appellant, and the several orders hereinbefore stated, and that the Lord Chancellor in declining to make any order on the petition for confirming the Master's report approving of the draft of settlement, intimated an opinion that some of the provisions thereof should be varied, deponent then stated that he and the Appellant had lived in mutual kindness to each other up to February then last, when he discovered an alienation of her affections from himself and the children, and on examination of his servants he learned that she was in the habit of receiving, in his absence, private visits from Antony Patrick Mahon, a surgeon in the Royal Artillery, and that on his expostulating with her on the impropriety of such conduct, she eloped from his home on the 4th of March, without his knowledge, and continued absent until the 18th of the same month, when by the persuasion of friends(c) she was induced to return, and for three days she conducted herself in a manner that gave deponent reason to believe that he should no longer have any ground of complaint against her; but about the 22d of March her manner and deportment were wholly altered, and

(c) She remained at the house of one of those friends during the fourteen days of absence from her husband's.

she from that time conducted herself in the most insulting manner towards deponent, and he verily believed, from the information which he had received, that the said Mr. Mahon had succeeded in totally estranging her affections from deponent and the children, and that she meditated an elopement with the said Mr. Mahon as soon as she should have succeeded in obtaining an order of the Court for confirmation of her marriage settlement, and that the application then pending was, in fact, the application of the said Mr. Mahon. Deponent further stated, that, in consequence of being reputed to have acquired a large property by his marriage with the Appellant, his father, who died possessed of a large real and personal estate, did not make any provision for him, and that deponent's means were very scanty, and totally insufficient to enable him to maintain and educate his two children by the Appellant in a manner befitting their station and expectances, and that the Appellant had frequently, since the said 22nd of March, stated to him her determination not to allow him one shilling of her income in future.

The Master of the Rolls, before whom these petitions were moved, made an order, dated the 30th of April 1834, whereby the parties were ordered to levy fines of the Appellant's freehold estates; such fines to enure to such uses as should be declared in and by the deed of settlement, to be finally settled and approved of by the Court, and to be executed by the parties as the Court should order; and, until such settlement should be executed, the said fines to enure to the use of the Appellant, her heirs and assigns; and it was referred to the Master to settle such fines, in case the parties should differ. The rest of Appellant's petition, and the petition on behalf of the chil-

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dren, were ordered to stand over until next petition day, with liberty to the Appellant to file such affidavits as she might be advised.

The Appellant accordingly filed an affidavit on the 10th of May 1834, wherein she detailed with great particularity the circumstances attending her first acquaintance with Mr. Hodgens, and his contempts of Court, as hereinbefore in part stated; and by way of recrimination and answer to his affidavit, she swore that, while they resided abroad, he kept her in obscure lodgings, consisting of two rooms, in one of which he used to lock her up for several hours, while he was out walking on business or pleasure; that he did not cause her to be instructed in literature or music, or other accomplishments befitting her age and station; that he did not go with her, or give her the opportunity of going to any place of worship; that he kept her from all society, and withheld from her the necessary wearing apparel; that they lived in the most penurious manner, not from want of means, for Mr. Hodgens had always money enough to sustain them comfortably and respectably. Deponent further said, that the petition presented in her name, after returning from abroad and attaining her age of 21, praying to be discharged from wardship, was presented without her knowledge of its contents; and she verily believed, that if Mr. Hodgens could have succeeded in obtaining an order for such her discharge, he would not have proposed any settlement of her fortune. She denied that she said to Master Connor, in the interview with him, that in *consequence of Mr. Hodgens' kindness* to her for the five years they lived together abroad, she was determined to re-marry him; but what she said was, that for her own honour and reputation she thought it better to marry him; that she was not aware, while

living with him abroad, that the marriage of 1820 was declared void, but she believed that Mr. Hodgens was aware of it; that often since the marriage in 1827 he used to beat and otherwise ill-treat her; that ever since that marriage she gave him all the annual income of her property, amounting altogether to about 15,000 *l.*, and he vested several thousands thereof in the public stocks in his own name, and was far from being left with scanty means.

The Master of the Rolls, after further hearing the petition and cross-petition, and the said affidavits, and several others filed on both sides, by an order dated the 22d of May 1834, ordered that the Master should be at liberty to review his report, dated the 8th of February 1828, and the draft of the marriage settlement therein mentioned, and in reviewing the same, that he should report the funds to be thereby vested and conveyed to trustees, having regard to the said orders of the 2d of August 1828, the 13th of February 1829, and the 10th of December 1833, and to the sum of 265 *l.* 3 *s.* 5 *d.* Old Government Three-and-a-half per Cent. stock, and 51 *l.* 1 *s.* 2 *d.*, specified in the petition, and also to any other funds to be vested in trustees by the said settlement; and that he should approve of fit persons to be appointed trustees in the settlement, and should amend the draft thereof by declaring and limiting the uses of the fines levied in the then last term of the freehold property; and the Court, having regard to the several contempts committed by the said Thomas Hodgens, especially to those mentioned in the orders of the 1st of April 1820, the 24th of February and 30th of May 1821, and the 15th of May 1822, declared that the Master, in settling the draft of settlement, ought to provide by effectual provisions and limitations to exclude the said Thomas

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Hodgens from any present, future or contingent interest in the property, real or personal, of the said Anne Hodgens, his wife, or any part thereof, except so far as the draft of settlement enabled her, by virtue of the power therein contained, and in the events therein mentioned, to make an appointment in his favour of a portion of the personal property, not exceeding one-fifth thereof. And accordingly, it was ordered that the Master, in settling and approving the said draft of settlement, should exclude the said Thomas Hodgens from any participation, benefit or advantage, right or interest in the said property of the said Anne Hodgens, real or personal, present, future or contingent, save under an appointment to be made by her as aforesaid, by virtue of the power of appointment to be reserved to her by the said settlement, to be exercised by her in the manner therein particularly provided, not exceeding one-fifth part of the said personal property. And it was further ordered that the Master should amend the said draft of settlement as to that part which provided, "that in case the said Anne should not leave any issue by Thomas Hodgens, who should become entitled to any benefits, as provided in the said draft, then in trust for such person or persons, and in such shares and proportions as the said Anne should in the lifetime of Thomas Hodgens, by her will, or, after his death, either by her will or by any deed to be by her executed and attested as therein mentioned, direct and appoint; and in default of such appointment, then in trust for her, her executors, administrators and assigns," (d) by providing that in default of such appointment the said personal property be limited in trust for the said Anne Hodgens and her next of kin, to the express exclusion of the said Thomas

(d) Vide ante, p. 331.

Hodgens, his executors and administrators. And his Honor further ordered, that the Accountant-General do continue, in pursuance of the order dated the 10th December 1833, to draw in favour of the Appellant for the dividends which should accrue due from time to time upon the funds therein mentioned, and on her separate receipt, until further order, and that she be at liberty to continue to receive the rents and profits of the freehold property as her separate estate until further order.

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On the 19th of May, and before this last order was made, the Appellant again eloped from her husband's residence with Mr. Antony Patrick Mahon, against whom Mr. Hodgens brought an action for criminal conversation with the Appellant, and obtained a verdict therein with damages. The Appellant, from the time of her said elopement, received the income of the real and personal property payable on her own receipt under the orders before stated, without contributing any part thereof to the maintenance of her children. She made an offer by her attorney, that if Mr. Hodgens would place them at a proper school, she would pay all necessary expenses incurred by them, which offer was not attended to. The annual income of the personal property amounted then to about 2,343*l.*, and of the freehold property to 156 *l.*, or thereabouts.

On the 12th of January 1835, Mr. Hodgens presented a petition to the Lord Chancellor, praying that the Master, in proceeding under the order of reference of the 22nd of May 1834, might amend the draft of settlement by providing out of the income of the Appellant's property, during her life, a competent sum to be paid to him yearly for the maintenance and education of the children during their minority, and for their support and advancement after they should

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attain their age of 21 years; and that the Master might further amend the said draft in reference to the disposition of the residue of the income of the Appellant's property during her life, in such manner as his Lordship should think proper under the circumstances of the case, and that in the meantime the execution of the orders of the 2d August 1828, 13th of February 1829, 10th of December 1833, and 23d May 1834, so far as the same empowered the Appellant to receive on her separate receipt, and as her separate estate, the interest and dividends, rents and profits of the said funds and freehold property respectively, might be superseded, and that she might be restrained from receiving the same.

It was on the same day ordered by the Master of the Rolls, that the matter of the said petition do stand over to the then next Wednesday; and that payments under the said orders be stayed in the meantime until further order.

On the 26th of the said month of January, the application on behalf of the children was renewed, whereupon it was ordered by the Master of the Rolls to this effect: "It appearing to the Court that the order dated the 28th of November 1827, was made against Thomas Hodgens, then and still in contempt under the three orders for attachments, upon his submission, stated in the said order, to execute such deed of settlement as the Court might direct, and to submit himself in every respect to the jurisdiction of the Court, and that the jurisdiction was exercised, and the said order was made in relation to the marital rights of Thomas Hodgens, in the fortune of Anne Hodgens, as against a person liable to the jurisdiction of the Court under the said contempts, and that the said order did not import and could not be deemed to

be taken as in the nature of articles of agreement previous to the marriage ; and it further appearing from the affidavits of Thomas Hodgens, that having presented a petition to confirm the Master's report under the said order, in relation to the draft of settlement, the then Lord Chancellor declined to make any order thereon ; and it further appearing that the draft of settlement has never been approved of by any order of the Court, and that by order dated the 22d of May 1834, grounded upon the petition of Anne Hodgens, it was ordered that the Master should be at liberty to review his report dated the 8th February 1828, and the draft of the marriage settlement therein mentioned, and to make amendments and variations, therein specified ; and it further appearing to the Court that Henry Walker Hodgens and Thomas Walker Hodgens, the infants and only children of Thomas and Anne Hodgens, since their marriage, under the said order of the 28th of November 1827, were without any present provision for their education and maintenance during their minority, and for their subsistence and advancement after their full age, during the lifetime of Ann Hodgens ; and it further appearing that before any draft of the settlement should now be approved of, regard should be had to the state of facts and of the family, and to the occurrences which had taken place since the order of the 22d of May 1834, it was ordered, that it be referred to the Master, in proceeding under the order dated the 22d May 1834, further to inquire and report whether the infant Respondents had been maintained out of the separate estate of the Appellant Anne Hodgens up to any and what period, and whether, in reviewing and approving of a draft of settlement under the last mentioned order, it would be necessary and proper,

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having regard to the circumstances in life of Thomas Hodgens, and to the consideration of his ability to maintain and educate the infant Respondents according to their future expectations and property, and afterwards to provide for them during the lifetime of the Appellant, that any and what yearly sum should be limited, payable out of the dividends of the fortune of the Appellant to the Respondents' father, Thomas Hodgens, during his lifetime, and afterwards to trustees for the Respondents in the event of the Appellant surviving Thomas Hodgens, during her lifetime, for the purpose of providing for the maintenance and education of the Respondents during their minority, and afterwards for providing a suitable subsistence and advancement for them during the lifetime of the Appellant, Thomas Hodgens undertaking to enter into and execute the said settlement with such proper covenants as the Court shall approve, for the purpose of binding him yearly to pass an account before the Master, for the said yearly sum, so to be paid to him, and after allowing all just disbursements and allowances for the maintenance and education of the Respondents, to vest the balance in Government Three-and-a-Half per Cent. stock, and transfer the same to the separate credit, in the third cause, of the Respondents or of the survivor of them, and also to concur in all necessary acts for the continuing such provision as shall be made during the lifetime of the Appellant if she shall survive Thomas Hodgens. And it was further ordered, that the declarations and directions in the order dated the 22d May 1834, be varied so far as the same are inconsistent with the said order. And his Honor declared that the Master in settling the draft of settlement, ought to provide by effectual provisions and limitations, to exclude Thomas Hod-

gens from any present, future, or contingent interest in the property, real or personal, of the Appellant, save the provisions therein referred to the Master, to report for Thomas Hodgens, for the benefit and in trust for the infant Respondents; and save any benefit which he might derive under any appointment to be executed under the power of appointment mentioned in the last mentioned order, and proposed to be reserved to the Appellant. And pending the reference, and until further order, it was ordered that the order dated the 12th of January then instant be discharged, and that the Accountant-General do, in execution of the orders of the 10th of December 1833 and the 22d of May 1834, draw out of the dividends of the funds standing to the credit of the third cause, as an interim provision in favour of the Appellant or her appointee, as her separate estate, for the sum of 700*l.* half yearly, until further order; and that the residue of the dividends be half yearly invested in Government securities, and transferred to the credit of the third cause."

On the 21st of February 1835, the Appellant appealed to the Lord Chancellor (Sir Edward Sugden), from the orders of the said 12th and 26th of January, whereupon the said orders were set aside; and it was further ordered that the Accountant-General should draw on the bank in favour of the Appellant, on her separate receipt, for the dividends which should from time to time accrue due on the funds mentioned in the orders of the 10th of December 1833, and 22d of May 1834, pursuant to the directions contained in them.

The matter came before Lord Chancellor Plunkett on a rehearing, on the 1st of June 1835, when his Lordship, by an order dated on that day, reversed the order of the 21st of February, and ordered that the reference directed by the Master of the Rolls be proceeded in, and that the Master should inquire into

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the nature, amount, and value of the freehold and personal property of the Appellant, and whether the same, or any part thereof, had been at any time reduced into possession by Mr. Hodgens, and if so, under what circumstances(e).

This appeal was against that order.

Mr. *Wigram* and Mr. *Lancelot Shadwell*, for the Appellant:—After the experience the Appellant had of the disposition and conduct of Mr. Hodgens during the five years they lived together in France, she exercised her undoubted right, on attaining her age and consenting to re-marry him, to retain to herself the control over her fortune during her life. That was the condition on which she gave her consent to the marriage, and upon that understanding Mr. Hodgens also, in pursuance of the order made on his petition submitting to do whatever the Court would order, laid his proposals for a settlement before the Master. That settlement was approved of, and the formal execution of it was delayed only because the amount of the property, which was to be the subject of it, was not then ascertained. Although the Master's report, approving of the settlement, was not formally confirmed, the Court acted on it by various orders, putting the whole income of the property at the disposal of the wife. Every one of these orders was in effect a confirmation of the Master's report. The Court of Chancery had no power to revoke or vary the settlement without the express consent of the wife. The Court, by the order appealed from, has varied the

(e) The judgment pronounced by *Lord Plunket*, in making this order, is reported 1 *Lloyd & Goold*, 137, *Cas. Temp.* Lord Chancellor Plunket. In the same vol. p. 148, is the judgment of Sir *William M'Mahon*, M. R., in making the order of the 26th of Jan. 1835. The case before Lord Chancellor Sugden, and his judgment, are reported by Messrs. *Lloyd & Goold*, *Cas. Temp.* Lord Chancellor Sugden, p. 259.

settlement most materially, not only by taking part of her income from the Appellant, but also by giving the control over it to Mr. Hodgens.

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The order of the Master of the Rolls, of the 26th of January 1835, which is set up by Lord Plunkett, is put on five grounds, which are stated in the recitals to it: *First*, that the order of the 28th of November 1827 (made on Mr. Hodgens undertaking to do whatever the Court would order for the protection and honour of the Appellant), could not be deemed to be taken in the nature of articles of agreement previous to the marriage; *secondly*, that the report of the settlement was not confirmed by any order of Court; *thirdly*, that on Mrs. Hodgens' petition an order was made in May 1834, directing the Master to review his report, and alter and amend the draft of settlement in a manner beneficial to her; *fourthly*, that the children of the marriage were without any provision for their maintenance and education during minority, or for their subsistence and advancement afterwards, during the life of the mother; and *fifthly*, that before any settlement should be approved of, regard should be had to the now existing state of the family, and to the circumstances and events which have happened.

With regard to the first ground of his Honor's order, it is necessary to refer to Mr. Hodgens' petition in November 1827. He there states that he and Anne Walker were anxious to have a valid marriage celebrated between them; that he was willing to execute such settlement of her property as the Court should direct, and to submit himself in every respect to the jurisdiction; and he prayed a reference to the Master, undertaking to perform whatever should be ordered. On that petition the Lord Chancellor made an order directing a legal marriage to be solemnized, and that Mr. Hodgens should proceed to lay before the

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Master proposals for a proper settlement of the lady's fortune.

[The *Lord Chancellor* :—That is not the usual course of proceeding in this country ; this order directs the marriage first, and a settlement of the property after.]

It appears, however, that the order was made by Sir Antony Hart, then Lord Chancellor of Ireland, induced to that course, probably, by the way in which those parties had been living, and by the unascertained state of the property, the same reason which caused the execution of the settlement afterwards to be postponed. But in pursuance of the order, a marriage was duly solemnized, and Mr. Hodgens laid before the Master proposals for a settlement such as, according to the statement in his own affidavit, the Master had previously suggested. The Master reported, that he had approved of a draft of the settlement, in pursuance of the proposals, settling the whole income of the property, real and personal, to the separate use of the wife for her life, but that he postponed the engrossment. Mr. Hodgens petitioned the Court to confirm the report, but the Lord Chancellor declined to make an order for the same reasons which the Master had for postponing the engrossment of the deed, and which are stated in the printed cases of both parties laid before the House, but more fully in the affidavit of Mr. Hodgens. He there states, in substance “that the solicitors who defended Anne Hodgens during her minority in a suit against her, opposed the confirmation of the report, alleging that a large sum was due to them, payable out of the funds which were to be the subject of the settlement ; that an inquiry was in progress before the Master to ascertain the rights of several parties interested in the funds, and they objected to any settlement until their demands were satisfied ; and also that Henry and Joseph

Walker (illegitimate brothers of Mrs. Hodgens, asserting legitimacy) applied to the Court, one claiming to be entitled to the freehold estates as heir-at-law of the father and uncle of Mrs. Hodgens, and both claiming to be of next of kin to them ; and they stated that there was a suit pending in respect of their alleged rights, and they objected to any settlement of the property so claimed by them ; and the Lord Chancellor, in consequence of these applications, appointed a day to hear counsel for all parties, and counsel were accordingly heard on the 23d of February 1828, when his Lordship declined, under the circumstances of the case, to make any order on the petition, but he directed that when the title and amount of the property of Anne Hodgens should be ascertained, an application should be made to him respecting the settlement." These were the reasons for not then confirming the settlement. From this uncontradicted statement of facts it was clear that the settlement was concluded, except as to the amount of the property, and was as binding as any articles before marriage could be, and therefore the first ground for the order of the Master of the Rolls wholly failed.

It is true the Court never confirmed the report by any order expressly made for that purpose, but it acted on the report by several orders, all giving the income of the property to the separate use of Mrs. Hodgens. The Court did what was equivalent to a formal confirmation of the settlement, by the orders of the 2d of August 1828, of the 13th of February 1829, and 10th of December 1833, and its jurisdiction over the settlement was fully exercised and exhausted. But not only the Court, but Mr. Hodgens also, who now attempts to open the settlement, acted upon it. He says in his affidavit, " that since the draft of settlement was approved of by the Master, he kept in

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view and acted according to its provisions, and in pursuance thereof he presented a petition, whereupon he sought and obtained the order of the 2d of August 1828, for payment to Anne Hodgens of the dividends of her funded property on her separate receipt; and he presented another petition in February 1829, whereby he sought and obtained the order of that date for discharging the receiver of her freehold estate, and for letting her into possession of the rents as her separate estate; and it was his intention, when certain claims to the property were disposed of, to apply to the Court for liberty to execute the settlement." The Court had no power to alter the settlement so acted upon, and at all events Mr. Hodgens, who made the proposals and petitioned to confirm it, and who was an acting and consenting party to all the orders, was concluded by them. The delay in confirming the settlement being caused by the pending suits, when they were disposed of, and a final decree made in 1833, the funds were then transferred, and the whole of the income was ordered to be paid to Mrs. Hodgens in pursuance of the settlement.

The Master of the Rolls was also in error on the third ground of his order, for the order of the 22d of May, directing the Master to review and amend the settlement, was not asked by Mrs. Hodgens in her petition: it was the suggestion of the Court. The petitioner said she was advised that "it was material and beneficial to her and the children to have the settlement executed, and she was advised that no alteration was necessary, and she prayed the Court to order Mr. Hodgens to execute it with such alterations therein, *with respect to the amount of her property* (if any), as the Master might recommend." The Court however, of its own suggestion, directed, by the order then made, a more especial exclusion of Mr. Hodgens from any

right, interest, benefit, or advantage from the property, than the previous orders appeared to the Court to provide for. The Appellant's case is based upon this broad principle.—A woman *sui juris*, about to contract a marriage, has a right to say, “ I will reserve to myself the control of my property, and I will not marry on any other condition.” The Appellant was entitled to assert that principle, especially against Mr. Hodgens, whose whole conduct proved that property was his object. That is the principle on which this settlement and the orders of Court and the decree of Lord Chancellor Sugden proceeded: it is on that principle that the Court of Chancery protects the property of its wards, and insists upon a settlement of it to their exclusive use, sometimes even against their own consent, in cases of contempt: *Stackpole v. Beaumont* (a), *Millett v. Rowse* (b), *Austen v. Halsey* (c).

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The other points upon which the Master of the Rolls grounded his order, and upon which Lord Plunket affirmed it, were the omission in the settlement of any provision for the children of the marriage during the life of their mother, her desertion and abandonment of them, Mr. Hodgens' alleged inability to support them, and the subsequent misconduct of the wife. Now it is a clear and established principle, that the children have no conflicting rights as against the wife; they have no abstract or substantive right independent of the mother. Their equity to a provision out of her fortune comes under and after her equity to a settlement. The wife, after attaining her age, might come into Court and waive her equity at any time before settlement executed, and then the equity of the children would be gone: *Murray v. Lord Elibank* (d),

(a) 3 Ves. jun. 89, *see* pp. 95 & 98.

(b) 7 Ves. 419.

(c) 2 Sim. & Stu. 123, n.

(d) 10 Ves. 84, and 13 Ves. 1.

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Steinmetz v. Halthin (e), *Lloyd v. Williams* (f), *Fenner v. Taylor* (g). The father is liable to maintain his children: the law casts that obligation on him, and not on the mother. Mr. Hodgens is, as he stated in his petition for leave to marry the ward, a member of the bar, and second son of a respectable merchant in Dublin; he has been for six years receiving from his wife the whole income of her fortune; she says, he received 15,000 *l.* from her altogether, and vested it in the public funds. Under these circumstances, he cannot be heard to say that he is not able to support his children. The wife's subsequent misconduct—to which, be it remembered, she was brought by the misconduct of her husband—cannot give the Court power to take her property from her. A court of equity does not punish her for misconduct. There is no case in which the Court altered the settlement of the wife's property on the ground of subsequent misconduct. The elopement and adultery of the wife is not a forfeiture of her rights under the settlement: *Trevor v. Trevor* (h), *Sidney v. Sidney* (i), *Field v. Serres* (k). This was a case of such flagrant misconduct on the part of Mr. Hodgens, that even if there had been no contract for a settlement excluding him, the Court would never permit him to derive any benefit from the wife's property, *Stackpole v. Beaumont* (l), *Like v. Beresford* (m), *Jacobson v. Williams* (n), *Millett v. Rowse* (o), *Bathurst v. Murray* (p), *Ball v. Coutts* (q), 6 Anne, c. 16, s. 1, Irish Act.

Mr. Jacob and Mr. Lynch, for the Respondents:—
 They were counsel for Mr. Hodgens' children, and not

(e) 1 Glyn & Jam. 64.
 (f) 1 Madd. 450.
 (g) 2 Russ. & Myl. 190.
 (h) 1 Eq. Cas. Abr. 387. 391.
 (i) 3 P. Wms. 269.
 (k) 1 New Rep. 121.

(l) 3 Ves. jun. 89, *see* p. 98.
 (m) *Ib.* 506.
 (n) 1 P. Wms. 382.
 (o) 7 Ves. 419.
 (p) 8 Ves. 74.
 (q) 1 Ves. & B. 392.

bound to defend his conduct, although it should be remembered that the ill treatment of his wife now imputed to him in her affidavit, was never mentioned by her until she formed the unhappy connexion with Mr. Mahon. In part of her affidavit sworn in May 1834, she said her only complaint against Mr. Hodgins was his charging her with receiving Mahon's visits, and that was her only reason for leaving home. Most of her accusations were either unfounded in fact, or greatly exaggerated. Dr. M'Kever, in his affidavit sworn April 1834, says, that from April 1828 he attended Mrs. Hodgins and her family professionally, and was a constant visitor at her house, and he swears that Mr. Hodgins conducted himself towards her in the most affectionate manner, was most anxious to promote her health, happiness, and comfort, and that she appeared to be extremely happy and contented. But the question for consideration is not so much as to the conduct and character of those persons, but as to the law and practice of courts of equity in regard to the wife's property, and to her children's right to maintenance out of it, under the circumstances in which these children are placed.

The Appellant insists that the Court of Chancery had no power to allocate any part of her property to the maintenance of her children without her consent. But by law, all her personal property and the rents of her freehold estates would have vested absolutely in the husband on their marriage after the Appellant attained twenty-one, if his marital rights were not controlled by the jurisdiction in equity operating on the property through his contempts. Mr. Hodgins having, on the pronouncing of the order of the 28th of November 1827, undertaken to execute such settlement as the Court should approve of, and the

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Court having no jurisdiction over the property of Mrs. Hodgens, save by reason of that undertaking and of the contempts committed by Mr. Hodgens in relation to her during her minority—and Mrs. Hodgens not having, before her marriage and after she had attained her full age of twenty-one years, stipulated for any settlement of her property whatsoever, it was competent for the Court, under the circumstances, to allocate a portion of the property for the maintenance and education of the Respondents during their minority, and for their subsistence and advancement after they should attain their full age, during the life of the Appellant. There is no qualification or restriction of the marital right by any agreement between the husband and wife: it is solely from the act of the Court that she derives the enjoyment of the income of her property. Had the Court acted on her own petition to be discharged from wardship on her attaining her age of twenty-one years, all her power over the income of her property would have passed to her husband by the act of marriage.

The order made on the petition of Mr. Hodgens in November 1827, did not amount to a contract to settle the property. Mr. Hodgens by his petition submitted himself to the jurisdiction, undertaking to do whatever the Court should order, for the purpose of discharging him from his contempt. The Court, instead of discharging him from the contempt, ordered him to lay proposals for a settlement before the Master. Proposals were accordingly carried in and approved of by the Master, but his report was never confirmed, and no settlement was executed. If it was competent for Mr. Hodgens at that time to contract in respect of the ward's property, would that contract be irrevocable before it was executed? The argument for the

Appellant is, that in equity the settlement being approved of by the Master, must be held as confirmed, because it was acted upon by several orders of Court. But some of the orders were a departure from the scheme of the proposed settlement. The power and discretion of the Court over the property was not irrevocably exercised. When the report came before the Lord Chancellor for confirmation, several parties, who claimed an interest in the property which was to be the subject of settlement, applied to the Court, and objected to any settlement of the property until their demands should be ascertained and disposed of; and the Lord Chancellor, on account of the entangled state of the property, declined then to make any order. Mr. Hodgens in his affidavit, says, upon this point, "that his Lordship having, in consequence of the said applications, appointed a day to hear counsel on behalf of the said parties and of Anne Hodgens and this deponent, touching the execution of the proposed deed of settlement; the said counsel, and also counsel on behalf of Mr. Roderick Connor, as guardian of Anne Hodgens, were heard before his Lordship on the 23rd of February 1824, when his Lordship was pleased, under the circumstances of the case, to intimate that he would make no order on the petition presented by this deponent as aforesaid (for confirming the Master's report), and his Lordship at the same time intimated *an opinion that some of the provisions in the said draft-deed should be varied.*" And accordingly the Court afterwards made several orders departing from or varying the proposed settlement. The order of the 13th of March 1828, for granting out of the wife's property 2,000*l.* to Mr. Hodgens as an outfit, was in derogation of the suggested settlement. It is not alleged that the Court had no right to make that order, and

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Sir Edward Sugden does not take any notice of it in his judgment. By the order of the 30th of April 1834, obtained on the petition of Mrs. Hodgens, she and Mr. Hodgens were directed to levy a fine of the freehold property to such uses as *should be declared by the deed of settlement to be finally settled and approved of* by the Court. Mrs. Hodgens acquiesced in that order, and joined in levying the fine, and thereby admitted the right of the Court to direct such settlement to be executed as, under the circumstances of the case, should be deemed fit, notwithstanding the report of February 1828, approving of the draft of the settlement. The report and draft of settlement were again varied by the order of the 22nd of May 1834, which was obtained on the petition of Mrs. Hodgens, who took benefits under it, and thereby she again admitted the jurisdiction of the Court to vary the proposed settlement.

The order of the 2nd of August 1828,—one of the orders that had the effect, as the Appellant alleges, of confirming the Master's report,—directed the dividends then and from time to time due on the funds in Court, to be paid to Mrs. Hodgens on her own receipt, but it did not specify how long they were to be paid to her, so that that was an *interim* order, clearly implying that some further order was to be made. The order of the 13th of February 1829, for discharging the receiver and letting Mrs. Hodgens into the receipt of the rents, was expressed to be made on consent; and the third order, relied on by the Appellant, made in December 1833, for transferring the funds in Court to the credit of the third of the causes, directed the Accountant-General to draw in favour of Mrs. Hodgens for the dividends from *time to time*, in execution of the order of August 1828, not in execution of the proposed settlement. Not one of these orders referred

to that settlement. Masters' reports are not confirmed by implication. The objection made by the Court to the confirmation of the report in 1828, continued up to the end of the year 1833, when the rights of the several parties asserting claims to the property were ascertained, and the first order of Court made after that time, that of the 22nd of May 1834, is inconsistent with the case set up for the Appellant, for by that order the Court further exercised its power to vary the settlement. Her counsel say, that order was not asked by her petition, and that it was made *in invitum*; but in her petition presented to the Court in November 1834, she says that order was considerably for her benefit.

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The question is, whether the Court had not in January 1835 the power which it then exercised in directing a further variation of the Master's report, or was the jurisdiction exhausted? If it were the law and practice of the Court, when a ward marries without leave, to settle the whole of her property to her use, then certainly a woman who so marries without a previous settlement, would have a right to complain that the law, on the faith of which she married, was broken in upon by the orders appealed from. But there is no such law, nor would it be conducive to the happiness of families to give the wife the whole control over the property, even in cases of contempt, and to make the husband and head of the family dependent on her: *Stevens v. Savage* (r), *Bathurst v. Murray* (s). In these cases, and in that of *Pearce v. Crutchfield* (t), which was a case of aggravated contempt, the Court approved of settlements giving the husbands reasonable proportions of the wives' property. In the case of Mr. Baseley (u), who lay in prison for several years for contempt of Court, in marrying a ward without leave, Lord

(r) 1 Ves. Jun. 154.

(s) 8 Ves. 74.

(t) 16 Ves. 48.

(u) See a note of Baseley's at the end of this case.

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Eldon, notwithstanding his strong animadversions on his conduct, in *Wade v. Broughton* (u), approved of a settlement whereby his debts were paid and 500*l.* a year settled on him out of the wife's fortune; and a provision was also made for the children of the marriage. Neither this case nor that of *Anne Henry* (x), which was still stronger, was brought under the consideration of Lord Chancellor Sugden. The large estates of *Anne Henry*, who married in contempt of Court, were, by direction of Lord Redesdale, Lord Chancellor of Ireland, conveyed to trustees upon trust to apply a portion of the rents for her and her children during the joint lives of her and her husband.

If the Court of Chancery had jurisdiction in 1834, which it then actually exercised in favour of Mrs. Hodgens, in respect to the settlement of her property, was it not competent for the Court, in 1835, to look to the circumstances which had then occurred, and to direct a provision for these children out of the mother's property, out of which they had been supported up to that time? In the case of *Ball v. Coutts* (y), Lord Eldon took into consideration circumstances that happened after the marriage, and varied a previous settlement, which had not been confirmed. So also in the cases of *Baseley* and *Anne Henry*, events and circumstances subsequent to the marriage were looked to. The Act of the Irish Parliament, 6th of Anne, cap. 16, (severe enough against a man marrying without consent a maid having property), provided by the 2d section for the maintenance and education of the children of such women. And by the late Marriage Act, 4 Geo. 4, cap. 76, sec. 23, where both the parents

(u) 3 V. & B. 172. (x) Lloyd & Goold, cas. temp. Lord Plunket, 1432.
 (y) 1 V. & B. 292.

are guilty of violating the Act, it is provided that the Court may secure the property, or part of it, for the children, &c., regard being had to the benefit of the issue of the marriage during the lives of the parents. Upon the policy of the law, and upon the authorities before referred to, as well as upon the principles of morality, a part of this lady's large income should be appropriated to the support and education of her children, whom the father is not able to maintain. The cases show that Lord Chancellor Sugden's judgment, overruling the Master of the Rolls, was erroneous in holding; *first*, that the jurisdiction of the Court over the ward's property was exhausted by the orders of August 1828 and February 1829; *secondly*, that in all cases of contempt, the husband is excluded from any share in the wife's property; and *thirdly*, that in no case have subsequent circumstances been looked to for the purpose of providing for the children out of the wife's separate property during her life.

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Lord *Brougham*:—All the cases referred to, in which the Court looked to subsequent circumstances, were cases in which the marriage took place before the Court exercised any jurisdiction over the ward's property.

Mr. *Wigram* replied:—Lord Chancellor Sugden did not say the Court had no jurisdiction to appropriate part of the wife's fortune to the use of the husband and children in any case. That learned judge's argument, which appeared to have been misunderstood by the Respondent's counsel and by Lord Plunket was, that the Court could not vary the settlement, made with consent of the wife, on the faith of which she married, and to which the Court had given effect. As far as the wife's life estate was con-

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cerned, the jurisdiction of the Court was exhausted. The petition of Mr. Hodgens, and the order made on it the 28th of November 1828, the marriage, and the proposals laid by him before the Master in pursuance of that order, together with the Master's report approving of the proposed settlement, were in the nature of a marriage contract actually executed. According to that contract the wife was entitled to a life estate in all her property. The subsequent proceedings and orders of Court confirmed that estate to her. But even though the order and proceedings under it did not constitute a contract, still the Court of Chancery would not under the circumstances of Mr. Hodgens give him any benefit from the wife's property, which the order under appeal would effectually give him, by relieving him from the legal obligation of supporting his children. His repeated contempts and violations of his solemn promises to the Court, and his whole conduct towards the Appellant, made it imperative on the Court to exclude him from any advantage from her property.

The *Lord Chancellor* said this was a case of peculiar circumstances such as he hoped would not occur again. The orders of Court brought under review of their Lordships, required very careful consideration, and for that reason he moved that the case be adjourned to Thursday next.

His *Lordship*, after conferring with Lord Wynford and Lord Brougham, again observed that it was just suggested to him that it might be expedient to adjourn the consideration of the case further, in hopes that the parties might come to an arrangement among themselves for some provision for those children, without calling for the decision of the House.

The case was accordingly adjourned.

The *Lord Chancellor* :—This case comes before your Lordships under circumstances of great difficulty as regards authority. In the first place, an order was made by the Master of the Rolls in Ireland, by which he directed a reference to the Master to inquire whether it was necessary that any and what yearly sum should be paid out of the dividends of Mrs. Hodgens's fortune to Mr. Hodgens, during his life, and afterwards to trustees during her life, in the event of her surviving him, for the maintenance of their children during their minority, and for their subsistence and advancement afterwards, and that, in the meantime, until the Master should have made his report, the Accountant-General should draw in Mrs. Hodgens' favour upon the funds in Court to the amount only of 700*l.* half-yearly, and that the remainder of Mrs. Hodgens's separate income should be vested in Government securities, and transferred to the separate credit of the infant children. The case came afterwards, by way of appeal from that order, before Sir Edward Sugden, when he was Lord Chancellor of Ireland, and he reversed the order of the Master of the Rolls. The order which reversed the order of the Master of the Rolls then came for rehearing before the present Lord Chancellor of Ireland (Lord Plunket), who was of opinion that the order of the Master of the Rolls was correct, and being of that opinion he reversed the order of his predecessor, and so, in point of fact, gave effect to the previous order of the Master of the Rolls.

The question raised is as to the income of a married woman who had been a ward of the Court of Chancery in Ireland, and who had been married to the Respondent, Thomas Hodgens, under very peculiar circumstances, which, in the outline at least, I think it right to state to your Lordships.

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[illegible]

The plaintiff having attained her age of twenty-one years, she was permitted to return with her to Ireland, and to marry there, in the usual form, to the jurisdiction of the Court, and to abide by such determination as the Court might make with respect to her marriage. He applied to the Court by petition praying that he might be allowed to have a valid marriage celebrated with the plaintiff. It appears by an affidavit which he has brought forward in support of his case, that a course was then adopted which I hope never again to be adopted by a Court of Equity, and which certainly would never have been adopted in this country. The Court permitted the marriage to take

place without first taking those steps which were proper to secure the interest of the ward, and which the Court ought in the first place to have taken. It is stated by this affidavit that the Court ordered a legal marriage to be solemnized, but that previous to such marriage an interview took place between Anne Walker, now Mrs. Hodgens, and Mr. Roderick Connor, who had been appointed a guardian to this infant, at which she stated her willingness to have this marriage celebrated. The affidavit then states that soon after the said interview "a legal marriage was solemnized between the deponent and the said Anne Hodgens, in obedience to the said order, and thereupon the deponent further in obedience to the said order laid before William Henn, Esquire, proposals for a settlement of the property of Anne Hodgens, which proposals were in conformity to an intimation previously given by the said Master of the terms of settlement of which, if proposed, he would approve." He then says, that the Master having approved of the said proposals, a draft of a deed in conformity with the proposals was prepared, and having been perused and amended by the Master, and submitted to and approved by the said Roderick Connor, as guardian to the ward, it was fully approved by the Master and certified by him accordingly.

It appears that the infant was entitled to some real estate in possession, and to a very considerable personal estate, but that the titles to both estates were in litigation in three different suits then pending in the Court of Chancery in Ireland; it was, therefore, obviously very difficult to make an actual settlement of the property, being in the state which I have described. The proposals were such as might have been expected, being made in pursuance of an intima-

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tion previously given by the Master in a private communication, and in the terms upon which he had expressed that he should approve of the settlement; and indeed a person so offending, as Mr. Hodgens had offended, could not hope that any other terms would be accepted than such as would divest him of all interest in the property of the ward, and accordingly those proposals were, that the real estate should be settled to the use of the wife for her life, and after her death, upon the issue of the marriage, and that the personal estate should be settled in the same manner, except only with a power reserved to the wife by will to appoint any portion of that property, not exceeding one-fifth, to Mr. Hodgens, in case he should survive her; it was therefore in her power to settle one-fifth part of the personal estate upon her husband if she so pleased. The proposed settlement then provided that the children should be entitled to the whole of the personal estate with the exception of this one-fifth, if she should so settle the one-fifth; and in the event of there being no children, then the property was to go in trust for such persons as Mrs. Hodgens, either in the lifetime of Mr. Hodgens, or after his death, should by her will, or by any deed, direct or appoint; and in default of appointment, in trust for Mrs. Hodgens, her executors, administrators and assigns; obviously therefore intending to exclude the husband from any direct benefit in point of right to any of the property which had been the property of the ward.

When the report of the Master, approving of the settlement, came before the Lord Chancellor of Ireland for confirmation, it appeared to him that, from the state of the property, it was not possible, as indeed it was not expedient, to act upon it at that time. It is stated in both the printed cases, and therefore we may

assume it to be the fact, that those were the reasons, and the only reasons, which induced the Court to abstain from directing the Master to have a settlement actually executed in the terms of the proposal. The property being in litigation in three different causes, it was impossible to ascertain the exact amount of it; in fact, it was in that state in which it could not be put into trust, and it was for those reasons only, which the Court could not disapprove of, that the Master abstained from having the settlement executed according to the proposals. As these causes proceeded, the title and property of this young person became ascertained, and three several orders were made, in strict conformity with the proposals so approved of by the Master in the year 1828. The personal property having by that time, by the decision of the causes, been ascertained to be the property of the ward, who then had attained her age of twenty-one years, an order was made, dated the 2d of August 1828, by which the income arising from the property was directed to be held for the sole and separate use of Mrs. Hodgens. In the month of February 1829, the title to the real estate having become ascertained and decided in her favour as against the other persons who claimed it, the receiver of that estate was discharged, and she was let into possession of the income for her own separate use. In December 1833 another order was made for the payment of the then existing fund, constituting her property, for her sole and separate use, and Mr. Hodgens was a party to all these proceedings, either as petitioning with his wife or as a party consenting to the orders pronounced, and therefore unquestionably he must be considered as being bound not only by the force of the orders of the Court, but also being a concurring and consenting party in the directions of

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those several orders. We have him, therefore, proposing to divest himself of all interest in the property of his wife, and then we have three several orders applying the property to the wife's sole and separate use, in conformity with his proposals for the settlement.

In the year 1834, in order to give effect, and as preparatory to the final settlement of the real estate, it became necessary to make an order of the Court of Chancery to direct Mr. and Mrs. Hodgens to join in levying a fine to such uses as should be finally settled and approved of by the Court, and accordingly an order was, in the month of April in that year, pronounced for that purpose. In the month of May in the same year, the personal property having varied so much from what it was at the time that the Master had made his report, a petition was presented by Mrs. Hodgens, praying that the necessary alterations might be made in the proposed settlement, and that measures might be taken for the purpose of carrying that settlement into effect. Nothing prayed by that petition appears to have been at all at variance with the proposals that were carried in and approved by the Master. But it appears that the Court interfered, and seeing that in the event of there being no children,—an event, however, not likely to occur, as there were at that time two children,—but in a certain possible event happening, there was a provision that the property should go to the executors or administrators of Mrs. Hodgens; and as, in the event of her death without children, her husband surviving her might fill the character of her administrator, and so become entitled to the property, being of opinion that in no possible event Mr. Hodgens ought to have the chance of becoming the administrator of the

estate, the Court, upon its own suggestion, and not upon the application of Mrs. Hodgens, directed the Master to review that part of his report, and to provide that in no possible event should Mr. Hodgens be entitled to any portion of her property. The order is in these terms: "The Court having regard to the contempts committed by the said Thomas Hodgens," &c. [His Lordship read the order set forth *ante*, p. 339.]

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In the month of January 1835, a petition was presented in the name of Mr. Hodgens and his two infant children, praying that, out of the income which had been from the year 1828 appropriated to the separate use of Mrs. Hodgens, a provision might be made of a sum to be paid to him for the purpose of maintaining the children. It was stated (and of that statement unfortunately there is now no doubt) that this unfortunate ward (who had been so taken from the protection of the Court at the age of thirteen and a half, by this Mr. Hodgens, and with whom he had, from the year 1822 till the year 1827, cohabited, knowing that there was no marriage, and she probably not being aware that such was the case)—that this unfortunate connexion had ended in adultery, committed by the wife; and upon the ground of the adultery by the wife, and of the separation that had then taken place, Mr. Hodgens alleged that the two children had been left entirely to his charge, and that he had no means of his own by which he could provide for them; he therefore applied to the Court and prayed that he might have out of her income a sufficient sum allowed to him for the maintenance of those two children. That petition came on before the Master of the Rolls in Ireland on the 12th of January 1835. The effect of the order then made was to suspend the payment of the whole income to Mrs.

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Hodgens, which she became entitled to under the preceding orders. On the 26th of January the petition came on for further hearing, and an order was made upon that petition by the Master of the Rolls, by which he referred it to the Master to inquire what sum should be allowed to Mr. Hodgins for the maintenance of the children during their minority, and for their advancement when they came of age; and in the meantime he directed that the 700*l.* payable every half year out of the income, which had been directed by the former order to be paid to Mrs. Hodgins, should be continued to be paid to her, and that the rest should accumulate and be carried to the account of the children.

These two orders were the subject of appeal in the Court of Chancery in Ireland, to Lord Chancellor Sugden; the appeal came on for hearing on the 21st February 1835, and ended in those orders being discharged. There was a subsequent rehearing before the present Lord Chancellor of Ireland, who being of opinion that the Master of the Rolls had properly exercised his jurisdiction in making the orders of the 12th and 26th of January, directed the order reversing them to be discharged, in effect therefore setting up the order which the Master of the Rolls had made.

It is fortunate that the order of the Master of the Rolls of the 26th of January recites the various grounds upon which it is supported. It states that the draft of the settlement had never been approved; that alterations had been made in that draft in the month of May 1834, upon the application of Mrs. Hodgins, and it states that the children were without provision, after attaining their age of twenty-one, for their subsistence during the lifetime of their mother. It then states that the subsequent events, which had

taken place, justified the Court in altering the settlement as approved of by the Master in the year 1827. Now we have to consider those various grounds in the order in which they stand. There are two questions which your Lordships have to consider, first, whether the children have a right, as against their mother, to have any portion of her income appropriated to their maintenance; and secondly, whether Mr. Hodgens, who is the party applying together with his children, can have any such right as against the separate income of the wife. The order recites that the draft had never been approved. Now it is true that the Master's report had never been confirmed, but it is also true that it had never been confirmed on account only of the peculiar situation of the property; that the Court had for this reason abstained from directing the settlement to be executed. But the Court had, from the year 1828, when the Master made his report, on every occasion, when the matter came before it, acted upon the proposition of settling the property as settled by the Master; and it had by three successive orders directed the whole income of the property to be paid to Mrs. Hodgens, independently and separately from her husband; to be paid as against Mr. Hodgens, who was permitted to marry this ward upon the faith pledged by him to the Court that he would abide by such order as the Court might make, and abstain from asking for a participation in her income during his life, which is the important fact that your Lordships have to consider. I apprehend therefore that the circumstances which have taken place are quite conclusive against the right of Mr. Hodgens, and that nothing which might subsequently arise could entitle him to come to the Court and ask for any order, giving him any benefit in the estate of his wife, which

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the previous orders and the settlement approved by the Master had not given him. I say that he was bound by the proceedings; but if not, how infinitely more strongly was he bound by the conduct that he himself had pursued.

In cases of this description, where men seek to get advantages for themselves by obtaining possession of wards under the jurisdiction of a Court of Equity, and by so doing are guilty of contempts against its jurisdiction, the Court will seldom, if ever, permit them to profit by their misconduct, or to enjoy any part of the property, to obtain which has probably been the motive of their proceeding. But here was the case of a person, without any property of his own, not offering to settle any, guilty of repeated contempts, and guilty of misconduct towards the ward, such as to excite the indignation of a Court of Equity against him, and prevent his deriving any benefit from his misconduct, and therefore, whether we look to the transaction itself or to the individual, I apprehend that nothing could justify the Court in relaxing the orders which had been previously made, or to let the guilty party profit from his own wrong.

But it is said that Mrs. Hodgens had herself obtained an alteration in the terms of the proposed settlement by the order of May 1834. In the first place it does not appear that the alteration attempted to be made in the proposed settlement was at the suggestion of Mrs. Hodgens; the question was, whether the husband was sufficiently excluded, and the Court might very well, if it found any omission in the Master's report, give more effect to it, and recommend to the Master to take more care in carrying into effect the proposals of the husband so as to exclude him. It was not for the purpose of altering the settlement, but to carry

it more fully into effect, and prevent the possibility of the husband deriving any benefit from his wife's property, that that order was made. It was consistent with the husband's own proposition, and with the intention of the Court, which directed that all the property at that time available should be paid over to the separate use of the wife; but it appears to be the act of the Court itself, seeing that that object had not been sufficiently provided for by the limitations of the settlement as drawn. But supposing that there had been an erroneous order, by no possibility could the alteration of the settlement be considered as a circumstance to make it proper that the particular order for which the husband applied should be made, unless that order could be properly supported upon its own merits.

The third ground undoubtedly raises a question, I will not say of difficulty in point of authority, but a question requiring very grave consideration, inasmuch as it is that point which has given rise to these contradictory orders,—it is that the children were without provision; and being without provision, the Master of the Rolls thought that there was jurisdiction in the Court of Chancery to provide for them, during the life of their mother, out of her income. In cases either where the husband has been guilty of contempt in marrying a ward, or where he has not been guilty of such contempt, if a Court of Equity has jurisdiction over the property of the ward, it undoubtedly, in making settlements, constantly, and almost uniformly I may say, provides for the interests of the children. The case we have now to consider is, where the husband has been guilty of a gross contempt, and where the settlement to be made, and the objects to be provided for by that settlement, are to be considered with reference to the

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situation in which the husband stands as respects himself and the property of the ward, with regard to whom he has been guilty of an offence by marrying without the consent of the Court. The equity of the children is not an equity to which they are in their own right entitled. In making the settlement of the wife's property, the interests of the children are always attended to, because it must be supposed to be the object, and it is the duty of the Court, in carrying that object into effect, to provide for those whom the mother of the children would be anxious to provide for; but as between the mother and the children, I know of no authority for saying that the Court has jurisdiction to take from the mother that which the Court has given to the mother as against the right of the husband, for the purpose of creating a benefit to the children. That the children have no equity of their own, that it is only the equity that they obtain through the means of the consent of the mother, is sufficiently clear, when I call to your Lordships' recollection the fact, that if the mother, having attained the age of twenty-one, comes into Court and consents that the property shall be paid over to the husband, the Court will permit it to be paid over without reference to the interests of the children, but in no instance are the children permitted to assert an independent equity of their own, and in no instance has that right ever been permitted against the mother. It is against the father that the Court exercises jurisdiction to exclude him from those rights which the law would otherwise give him; and then the Court deals with those rights as between the children of the marriage, in such a way as may be thought for the interests of the family.

But the question is, whether the children have any right of their own against their mother to deprive her

of that income given to her by a settlement, which, though not actually executed, was in the hands of the Master at the time when the party thought proper to submit to the jurisdiction of the Court. I therefore consider the application made to the Master of the Rolls, either as made on behalf of the husband,—in which case I am sure it would not have been attended to by any branch of that Court for a single moment, though he was joined with the children, and claimed on behalf of the children,—or as made on behalf of the children themselves. If made on behalf of the children, it would be much to be desired that such order could be made in the unfortunate situation of the children of such parents. The acknowledged wickedness of the father, and the recent misconduct of the mother (whether that is to be attributed to the original misconduct of the husband, it is no part of your Lordships' duty to inquire), place the children in the most lamentable situation; and one cannot be surprised that the anxiety of the Courts should have been evinced, if consistent with the rules of the Court of Equity, to secure to these children the means of maintenance independently of either of their parents. But your Lordships are not at liberty to give way to these feelings, nor to depart from the established rules of Courts of Equity in administering the property of their wards. I do not feel that a Court of Equity has a right, under the circumstances of the case, to interpose on behalf of the children against the decree which their mother had obtained by means of the exercise of the jurisdiction of the Court against the marital rights of the husband. The property has, by his concession and by his consent, by arrangement entered into in the year 1828, become the separate property of the mother; the children may want even

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the necessaries of life ; they may want the means of proper education ; the law does not throw on the mother the duty, the legal obligation (the moral obligation we have nothing to do with here) of maintaining, educating, or providing for the children, and therefore I, though with great reluctance, looking at the situation of those children, feel myself bound to state to your Lordships my opinion, that the order, as made by the Master of the Rolls, was not consistent with the established practice of the Courts of Equity, and that that order, therefore, and the last order setting it up ought to be reversed, and that the intermediate order, setting aside the order of the Master of the Rolls, ought to be affirmed.

Lord *Wynford*:—My Lords, I cannot add anything to the very luminous observations of my noble and learned friend. I entirely concur in what he has stated. Your Lordships have heard of the misconduct of both those parents. It is due to this unfortunate woman to say, that whatever misconduct may be attributed to her now, originated in the most extraordinary misconduct of this person, who is now her husband. Your Lordships have heard that when she was thirteen years and a half old, he was committed for contempt of the Court in having procured possession of her person. He apologised to the Court, and was released on his promising not to have correspondence with her. He afterwards again got possession of her person and carried her out of the country ; kept her for five years in France, and kept her in a manner sufficient to degrade her mind and to lead her into the misconduct now truly imputed to her. But your Lordships, sitting judicially, have nothing to do with that question ; you are called upon to decide whether

according to law, as it is administered in the Courts of Equity, your Lordships can take away from a ward, without her consent, any part of her settled property even for the maintenance of the children of the marriage. I am bound to say, as my noble and learned friend has said already, that by no law existing in this country, can a woman be compelled to maintain her children, her husband being alive; and if that were not the law, the sort of maintenance which she would be compelled to afford to her children, would not be that which was asked by this application, and was conceded by this order; for according to this order, the woman's property is not only to be applied for maintenance suitable to the station of these children, of which the law knows nothing, but also to make a provision for them upon their coming of age. The mother is not bound to comply with such an order. The policy of the law of this country has thought it best to leave such provision to the law of nature; to leave both the father and the mother to the free exercise of their own feelings. But it is argued, that you can get at the property in consequence of the contempt of the husband. That would be a strange mode of administering justice, and contrary to common sense as well as to equity. It is argued, however, that the right to the wife's property passed by the act of marriage to the husband; that such was the situation in which the property stood the instant the woman married; that the personal property then passed to the husband, unless protected by some settlement. But in this case, your Lordships have heard from the very able statement of my noble and learned friend, that the husband had expressly consented to give up this right, and that the consent had been acted upon by the Court, and this unfortunate woman was prevailed upon to agree

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to a subsequent marriage in consequence of that consent. After the manner in which she had been treated in France, deprived almost of the necessaries of life, constantly beaten and ill-treated, it was not likely that she should consent to marry him, if she did not retain the dominion over her property, so that if she had not any control over his affections, she, at least, might have some over his interests; and there is no doubt that she would not have so married, unless the husband had given the consent upon which the Court acted. The order, for the reason stated by my noble and learned friend, was never perfectly completed, but it was in part acted upon by the Court, for the income of the property, which is very large, was directed to be paid over to the separate use of the wife. The husband never at any period of his life touched a single shilling of it. I speak with diffidence upon this subject, because it belongs to a branch of the administration of the law with which I have never been connected, but in which your Lordships have the assistance of my noble and learned friend, eminent for his knowledge in every branch of the law, and particularly in that branch by which this case must be decided. I believe that in equity, that which ought to be done and that which is agreed to be done, is considered as actually done. Is it possible to say that this is not actually and completely done in equity when this man obtained a marriage under an engagement to assign over his interest, and when, in consequence of that engagement, this woman consented to become his wife, and particularly afterwards, when orders were made from time to time to assign for her separate use the whole income of this property? Must it not be considered that that arrangement is completely confirmed, as much as if the Chancellor had

given his solemn sanction to it, and that the husband is completely divested of this property? Your Lordships therefore, by adopting the course now recommended, will not be taking anything from the husband, but by affirming this decree, you would be taking from the wife a part of her property to relieve the husband from the burden, which immediately and reasonably by law belongs to him; at all events, the burden of the maintenance of the children falls in the first instance upon the husband. The husband comes forward, he places before your Lordships his own delinquencies, and then says, "Though, in consequence of these delinquencies, you have a right to proceed immediately against me, you should only proceed nominally against me: you have power over the property of my wife—take from my wife her property; apply that property, which is taken from her, and which I was prevented from having in consequence of my contempt of the Court, to relieve me from the burden which is by the law immediately cast upon me."

We do not know whether the father is or is not able to sustain these children without any relief from this property; but the taking the property of the wife to maintain her children while the father is living is against the law; and it is still further against the law to apply the property for a maintenance suitable for their condition in life; for the condition in life of those children is, that they are children of parents one of whom possesses a very considerable property, but the other has nothing. But I hope that when your Lordships shall have disposed of this case according to the law, this lady will still recollect that there is another law by which she is bound,—the law of God and nature,—which will compel her suitably to maintain those children which she has brought into the world. As we have to decide this case according to the law,

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although it might have been desirable that the order could have been in part supported, so that some security for the maintenance of the children might have been obtained, the order must be dismissed altogether, as it appears to me, for the reasons which have been better given by my noble and learned friend than I can hope to give them. It is impossible for this House to sustain that order; nay, I do not wish to sustain it to the full extent. We have heard that hard cases make bad law. This is an extremely hard case, but it would indeed be making bad law,—it would be depriving parents of that right of property which in my opinion ought ever to be maintained,—if your Lordships affirmed this order.

I concur, therefore, with my noble and learned friend in the opinion that this order must be reversed, and I am authorised by my noble and learned friend Lord Brougham, to say that he was under the necessity of leaving the House before the judgment, but he entirely concurs in the opinion that the order ought to be reversed.

The order of the 1st of June 1835 was reversed accordingly.

The Editors have been favoured by Mr. Lynch with the following note of *Baseley's* case referred to in the argument for the respondents, p. 357, *ante*.

Wade v. Scruton (nom. *Wade v. Broughton*, 3 Ves. & B. 172)

Baseley v. Baseley.

Anne Wade (Mrs. Baseley) was the only child and heiress-at-law of Albany Wade, of Scots House, in the county of Durham, Esq., on whose death, in 1806, she became entitled, under his will and marriage settlement, and under the will of her paternal grandfather, to real and personal property of large amount, consisting of freehold, copyhold, and leasehold estates, mines and collieries, &c. She was made a ward of the Court of Chancery at an early age. In the year 1814, being then in her seventeenth year, she was taken away by Mr. Charles Henry Baseley, a young gentleman of no

property. He had no previous acquaintance with her or her family, but obtained possession of her by means of her governess and servants, and in gross contempt of Court. Mr. Baseley and the young lady went to Scotland, and were married at Gretna-green on the 27th of May 1815, and on the 24th of the month of July following, they were again married in the episcopal church of Edinburgh. They resided for some time in Scotland. Petitions on their behalf were presented to Lord Eldon, Chancellor, but his Lordship would not listen to any application until the ward was brought within the jurisdiction. Mr. Baseley at length presented himself in Court. The Lord Chancellor ordered him to be committed to the Fleet. He was kept in prison until Mrs. Baseley attained her age of twenty-one years in 1818. There were then three children, issue of the marriage.

By an order of the Court of Chancery, bearing date the 14th of August 1817, and made on the petition of Mr. Baseley in the above two causes (in the first of which Mrs. Baseley, by the description of *Anne Wade*, an infant, by *Thomas Wade*, her uncle and next friend, was plaintiff, and *Richard Scruton*, a trustee named in the wills of her father and grandfather, was defendant; and in the other *Mrs. Baseley*, by her said uncle and next friend, was plaintiff, and *Mr. Baseley*, her husband, was defendant), it was ordered that it should be referred to Mr. Alexander, the Master to whom the said causes stood referred, to review a report made by him in the said causes, and dated the 26th of July 1817, and in reviewing his said report, it was ordered that he should consider the proposals for a settlement on Mrs. Baseley, or such parts of them as he should think proper.

In pursuance of that order the said Master made his report, bearing date the 25th of June 1818, and he thereby certified, that he had reviewed his said former report, and had considered the proposals for a settlement on Mrs. Baseley, and he found that her property consisted of freehold and copyhold estate in the county of Durham, the rental of which amounted to the sum of 950 *l. per annum*, and of a leasehold estate for years, consisting chiefly of mines, producing upon an average 2,500 *l. per annum*, but subject as to certain parts of the said leasehold estates to the raising of a sum of 2,500 *l.*, the interest whereof was payable to Mrs. Broughton, aunt of Mrs. Baseley; after Mrs. Broughton's death the principal to be divided among her children; and he found that, over and above the aforesaid property, Mrs. Baseley was entitled to personal estate arising from the savings during her minority, amounting to the sum of 10,000 *l.* (which had been under an order of Court paid in to the Accountant-General, and vested in the Three per cent. Bank Annuities), and also to books, pictures, plate, and furniture, late belonging to her father; and the Master certified that, upon due consideration of all the circumstances of the case, after requiring certain alterations to be made in the proposals referred to him, and which alterations had been acquiesced in by Mr. Baseley and made accordingly, he (the Master) had ultimately approved of the proposals so modified, and they were to this effect:—With respect to the

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freehold, copyhold, and leasehold estates, it was proposed that the same should be vested in trustees to be appointed by the Master, in trust, during the term of seven years, to reserve out of the rents such sums annually as would form a fund for effecting renewals of the leases, and paying fines, &c. ; and subject to these trusts that the trustees should, during the joint lives of Mr. and Mrs. Baseley, raise out of the rents 500*l.* a year, and pay the same to Mr. Baseley, and pay the residue of the rents to Mrs. Baseley for her separate use, but she should be restrained from disposing of them by anticipation; and if Mr. Baseley should die in her lifetime, then to her for her life; but if Mr. Baseley should survive her, then one moiety of the estate to be limited to him during his life, and Mrs. Baseley to have a power of appointing the other moiety to him during his life by her will, but with a proviso that, after the decease of Mr. or Mrs. Baseley, the trustees should be empowered, during the life of the survivor, to raise any annual sum for the maintenance of the children, not exceeding in any one year the sum of 300*l.* for an eldest son or an only child, and 150*l.* for each of the other children; and subject to these uses, as to one moiety of the freehold and copyhold estates, to such one or more of the children or remoter issue of the marriage as Mr. and Mrs. Baseley should appoint, and in default of such appointment to all the children as tenants in common in tail, with cross remainders among them in tail; and in default of such issue, then if Mrs. Baseley should die in the lifetime of Mr. Baseley, to such uses as she should appoint by her will, and in default of such appointment to the use of such person or persons as at the time of her decease should be her heir or heirs-at-law, to be divided among them in equal shares, if more than one; but if Mr. Baseley should die in the lifetime of Mrs. Baseley, then after his decease this moiety to be settled to such uses as she (having survived Mr. Baseley) should by deed or will appoint, and in default of such appointment to her children, by any after-taken husband or husbands, as tenants in common in tail, with cross remainders among them in tail; and in default of such issue, to the use of the person or persons who, at the time of her decease, should be her heir or heirs-at-law, to be divided among them, if more than one, in equal shares; and as to the other moiety of the freehold and copyhold estate, if Mr. Baseley should die in the lifetime of Mrs. Baseley, then to such uses as she should by deed or will appoint, and in default of such appointment to her children by any after-taken husband or husbands, to be divided among them in equal shares, if more than one, as tenants in common in tail; and in default of such issue to her children by Mr. Baseley, to be divided among them, if more than one, in equal shares as tenants in common in tail, with cross remainders in tail; and in default of such issue, to the use of the person or persons who, at the time of her decease, should be her heir or heirs-at-law, to be divided among them, if more than one, in equal shares; but if Mrs. Baseley should die in the lifetime of Mr. Baseley, to her children by him as tenants in common in tail, with cross remainders in tail, and in default of such issue, to such uses as she should appoint by will, and in de-

fault of such appointment, to the use of the person or persons who, at the time of her decease, should be her heir or heirs-at-law, if more than one, in equal shares, with a proviso, agreement and declaration, that they, Mr. and Mrs. Baseley, should do nothing that would have the effect of preventing Mrs. Baseley from exercising the powers of appointment thereinbefore mentioned, or of preventing the estates devolving to her heir or heirs-at-law, in the events thereinbefore also mentioned, and that if they should so do, Mr. Baseley should forfeit the annuity and the benefit of the limitations in his favour. And with respect to the said leasehold estate, it was proposed that the same should be settled in moieties on corresponding trusts, and that the stock and other personal estate then in hand should be assigned to trustees, on trust to raise by sale so much money as should be necessary to pay and discharge all costs and expenses which the Court had ordered or should order to be paid out of the estate of Mrs. Baseley; and, in the next place, to raise any sum that should be necessary, not exceeding 7,000*l.*, for the payment of the debts contracted by Mr. and Mrs. Baseley since their marriage, for the maintenance and support of themselves and their children; and, in the next place, to raise any sum not exceeding 1,500*l.*, and apply the same in discharge of debts contracted by Mr. Baseley previous to his marriage. And further also, that the residue and surplus, as well of the said 10,000*l.* as of all other the personalty, except as before directed to be settled, should be paid into the proper hands of Mrs. Baseley for her peculiar and separate use and disposal, and to form a fund for their establishment in life and maintenance, comfort and support; and that a fund should be provided for reprising to the estate of Mrs. Baseley the sum of 1500*l.* appropriated for the payment of Mr. Baseley's personal debts. (The said settlement also to contain powers of working mines, of granting mining leases, of leasing for 21 years, of selling and exchanging, and a power to the trustees to raise any sums not exceeding 5,000*l.* for enabling the parties to carry on the mining concern.)

The Lord Chancellor, by an order bearing date the 26th of June 1818, confirmed the said report and the proposals therein mentioned, with an addition to this effect:—That the sum of 1,500*l.*, proposed to be raised to pay Mr. Baseley's debts contracted previously to the marriage, should be reprised to Mrs. Baseley's estate at the rate of 300*l.* a year out of the income of 500*l.* given to Mr. Baseley; and it was ordered to be referred back to the Master to appoint trustees and approve of a settlement according to the said proposals and the said addition thereto. (The Master having approved of fit persons to be trustees, a settlement prepared in pursuance of the said report, and order confirming it, was duly executed on the 7th of August 1818.)

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APPEAL

17 & 24 Mar.

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16 Aug. 1838.

FROM THE COURT OF CHANCERY.

JAMES SCOTT and CAROLINE ANNE, his
Wife, and HONEYWOOD DOBBYN YATE
SCOTT, an Infant, by the said JAMES
SCOTT, his Father and Guardian - - } *Appellants.*

SAMUEL JONES, Surviving Assignee of
Messrs. EVANS and JELF, Bankers, } *Respondent.*
Bankrupts - - - - - }

*Charge of
Debts on Real
and Personal
Estates.
Executors.
Statute of
Limitations.*

A debt which, at the death of a testator, is not barred by the Statute of Limitations, may become so afterwards as to the executors and legatees, notwithstanding a charge by the testator of his debts upon his personal estate; nor will the operation of the statute be prevented though the testator, erroneously supposing part of his personal estate to be real estate, has so described it in his will, and charged his debts upon it.

An executor's advertisement to creditors to send in an account of their claims for examination, does not amount to a promise sufficient to revive a debt already barred by the Statute of Limitations.

IN May 1815 Charles Evans and Sir James Jelf carried on business as bankers, in co-partnership together, at Gloucester, and on the 26th of that month a commission of bankruptcy issued against them, and they were duly declared bankrupts, and the Respondent and Edmund Boughton and Thomas Ridler (both since deceased) were chosen assignees of the estate and effects of the bankrupts, which were duly assigned to them in the usual manner.

Richard Donovan, late of Tibberton, in the county of Gloucester, esq., deceased, kept a banking account

with Evans and Jelf, and at the time of the bankruptcy there was due from him to the bankers the sum of 262 *l.* 4 *s.* 3 *d.* on a running account between them, bearing interest; and such account was exhibited under the commission on the 11th of July 1815, and Richard Donovan, who was one of the commissioners, admitted the account, and signed his initials as a commissioner, verifying the production thereof.

In the month of November 1815, Mr. Donovan, supposing himself to be seised in fee of the manor of Tibberton and the advowson of the parish of Tibberton, in the county of Gloucester, and of divers lands, tenements, and hereditaments in the parish, made his will, which was not dated, but which was executed and attested in such manner as to pass freehold estates; and thereby after reciting, amongst other things, that he was seised in fee of the estate at Tibberton, he devised all his real estates at Tibberton or elsewhere in England, and all his personal estate in England or in the West Indies, or elsewhere, of every kind, unto trustees, to get in all his personal estate and pay his debts thereout, if the same should be enough for that purpose, and to let Tibberton-court ready furnished, and to pay 150 *l.* per annum to his wife, Caroline Elizabeth Donovan, being the interest of 3,000 *l.*, part of her settlement, which was vested in the purchase of Tibberton-court estate; and, as to the remainder of the proceeds, to pay the same to his daughter, Caroline Anne Donovan, during her life. After other directions respecting his personal estate, he declared that, if his personal estate should be enough to pay his debts, without having recourse to selling his wine and linen, plate and books, then he gave his wine, &c. to his wife for her own use; but if it should not be enough, then he directed that his real estate at Tibberton should be either mortgaged or sold,

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as his trustees should think best for his family, for the purpose of discharging his debts; and, subject thereto, he devised the said estate, in case he should die without leaving issue male, to his said daughter, Caroline Anne Donovan, for her life, with remainder to her first and other sons in tail male.

Donovan died in July 1816, without having revoked or altered his will, leaving a widow, who died some years since, and the Appellant Caroline Anne Donovan, his daughter, and only child, and heir-at-law. Caroline Anne Donovan, some time afterwards, intermarried with the Appellant, Captain James Scott, and has issue the Appellant, Honeywood Dobbryn Yate Scott, her only child.

One of the trustees and executors renounced probate. The other, Mr. T. Rodie, proved the will and assumed the trust, but died in the year 1818, without having fully administered the estate. Shortly after his death, administration *de bonis non*, with the will annexed of the testator, Richard Donovan, was granted to the Appellant James Scott, during the minority of the Appellant Caroline Anne Scott, his wife, she being then under 21 years of age, and afterwards (in 1819) to her, on her attaining her majority. The debt of 262 *l.* 4 *s.* 3 *d.* was never paid, but such debt, with a large arrear of interest thereon, remained due to the Respondent. The general personal estate of the testator, Richard Donovan, was insufficient for the payment of his debts, and the Respondent and the other creditors, being aware of the devise contained in his will, declaring that the Tibberton estate was real estate, and being satisfied of the sufficiency of the Tibberton estate to answer all the charges, did not press for payment of their debts, and, in fact, very few of such debts were paid.

In the month of January 1822, the Appellant,

Caroline Ann Scott, as administratrix, published an advertisement in the Gloucester newspaper to the effect following: "Notice is hereby given by me, Caroline Anne Scott, of Tibberton-court, in the county of Gloucester, administratrix, with the will annexed of my late father, Richard Donovan, of Tibberton-court aforesaid, and of the city of Gloucester, esq., barrister-at-law, to all persons having, or claiming to have, any demand upon the estate of the said Richard Donovan, by specialty or otherwise, that they send in their several and respective statements of their demand, and also attested copies of their several and respective securities to Messrs. Clark, Richards & Medcalf, solicitors, 109, Chancery-lane, London, or to Mr. Bubb, solicitor, in Cheltenham, in the county of Gloucester, on or before the 24th day of April next, for their examination, prior to the same being laid before John Hawksey Acherley, of the city of Bath, esq., barrister at law, by whom I expect that the persons claiming to be creditors of the said Richard Donovan do submit to be examined touching and concerning the same, if the said John Hawksey Acherley shall see occasion, in order to their respective claims being approved and paid or rejected, if such latter course be deemed expedient. Timely notice, as to time and place, will be given in the London Gazette and in the Gloucester and Liverpool papers."

In consequence of the advertisement, the assignees of Evans & Jelf, on the 20th of April 1822, sent an account of their demand to Mr. Bubb, but, as it was alleged, delayed proceedings for its recovery, in the expectation that it would be paid without suit.

In the month of October 1822 the Tibberton estate was sold, under the trusts of the will, to Thomas Wal-

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lis, for the sum of 10,500 l., and it was then discovered that the estate was leasehold and not freehold, as stated in the will.

In the month of July 1823, the assignees commenced an action in the Court of Common Pleas against James Scott and Caroline Anne, his wife, as administratrix, to recover the amount of the debt and interest. The defendants pleaded the Statute of Limitations in bar of the demand, and no further proceedings were taken.

In Trinity term 1824, the assignees filed their bill in Chancery against the Appellants, and Wallis, as the purchaser of the estate, stating the above facts, and charging, that the existence of the debt had been admitted by the personal representatives of the said testator, within six years, and that such debt was then payable out of the testator's personal estate, independent of a trust created by his will for payment thereof; that the debt so due to the estate of the bankrupts was not affected by length of time, accrued since the death of the said testator, and that whether the Tibberton estate was real or personal, the same was bound by a trust for payment of the testator's debts, and was assets for that purpose, and that such trust was sufficient to prevent the Statute of Limitations from affecting the testator's debts after his death, and that the testator, by his will, treated the said estate as real estate, and created a trust thereof for payment of his debts, and thereby led Respondent and the other creditors to look to the estate as charged with a trust, and liable by means of such trust to payment of the debts, and that the plaintiffs and the other creditors of the said testator were in fact misled and deceived by the will, and that the creditors were induced to delay proceedings at law for the recovery of their debts, by the belief that

there were no leasehold assets to pay the same, but that the same were to be paid by means of the trust, and that it would, therefore, be a fraud upon the creditors if the testator's representatives were allowed to avail themselves of the Statute of Limitations in bar of their demands. The bill therefore prayed an account, and that the personal estate, including the purchase-money of the Tibberton estate, might be applied in payment thereof.

The Appellants set up the Statute of Limitations as an answer to the suit.

The cause came on to be heard before his Honor the Master of the Rolls, on the 26th day of February 1830, when his Honor dismissed the bill, with costs.

The assignees appealed to the Lord Chancellor, who by a decree dated on the 30th of June 1831, directed that the order, dated the 26th of February 1830, should be reversed ; and that the trusts of the will of the testator, Richard Donovan, so far as related to the payment of his debts, should be carried into execution, under the directions of the Court; and that it should be referred to the Master to take an account of what was due to the assignees, and all other creditors ; and an account of his funeral expenses, and to compute interest on his debts, carrying interest after such rate of interest as the same respectively carried ; and that the Master should also take an account of the testator's personal estate, and of the monies arising from the sale of the Tibberton-court estate, and the rents and profits ; and that the personal estate of Richard Donovan, including the proceeds of the said Tibberton-court estate, should be applied in payment of what should be found due to the assignees and the other creditors of the testator, for their debts,

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and of his funeral expenses, in a course of administration, (a).

The Appellants presented their petition to this House, appealing against this decree.

Mr. *Knight* and Mr. *G. Richards* for the Appellants:—The judgment in the Court below proceeds on the supposition that the case is to be discussed on the earlier authorities, as if the trust was a trust as to real estate. That is a mistake. There is no doubt that a trust applicable to real estate is not that against which the Statute of Limitations could run. There is no decision among the earlier authorities at all applicable to this case. The question in this case is, whether the merely charging a debt upon estate supposed to be real estate is to have the effect of reviving that debt with regard to personal estate, though it had been barred by the Statute of Limitations on the death of the testator. It was clearly settled by Sir T. Plumer, then Vice-Chancellor, in the case of *Burke v. Jones* (b), that a devise in trust for payment of debts does not revive a debt upon which the Statute of Limitations had taken effect before the testator's death. That it had not then taken effect makes no difference. Until a late Act (c), real estate was not liable to the payment of simple contract debts, so that the throwing of such a debt on the real estate would be to charge the estate with the payment of a sum to which it was not before liable by law. To charge a debt on real estate would be to convert the assets into equitable assets. The bond creditors would in

(a) See the report of the case before the Master of the Rolls, 1 Russ. & Myl. 255, and on appeal before the Lord Chancellor, id. 261.

(b) 2 Ves. & B. 275.

(c) 3 & 4 Will. 4, c. 104; see also as to the debts of a trader, 47 Geo. 3, st. 2, c. 74.

such a case lose the preference to which by law they would otherwise be entitled. The charge, therefore, alters the position of every class of creditors. Such a charge cannot be created by mere implication. Before the Statute of Will. 4, a devise of real estate was exempt from simple contract debts, except in the case of a trader (*d*), and the devise here is not within that exception. As to personal estate it was different. A man had no power over his personal estate as against his creditors or executors. All the personal estate must vest in the executors, and a charge of debts ordinarily makes all the creditors equal. If necessary for its own fulfilment such a charge invalidates other trusts of the executors as to personal estate. The executors become trustees of the creditors by operation of law, and yet at law they may plead the Statute of Limitations against any one of those creditors. The benefit of the statute is refused in equity to the executors by the decision now the subject of appeal. There is no just ground for placing them in this different situation, according as they are sued at law or in equity. The inconvenience of such a state of things was admitted and observed on in the judgment in the Court below. In fact, the result of affirming the decision in this case will be to declare that, wherever a testator in his will alludes to a debt, the Statute of Limitations shall not affect it. Yet, what has been the rule of the Courts even as to the statute which made real estate subject to the debts of a trader. In *Putnam v. Bates* (*e*) it was held, that the admission of a debt by the executrix of a trader within six years before the filing of a creditor's bill, will not take the debt out of the Statute of Limitations so as to enable the creditor, under the 47 Geo. 3, to claim payment

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(*d*) 47 Geo. 3, st. 2, c. 74.

(*e*) 3 Russ. 188.

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out of the real estates in the hands of a devisee. It is clear that, in order to prevent the Statute of Limitations from running, there must be some disposition of the property different from the way in which the law would dispose of it.—[Lord *Brougham*: Suppose that a person charged his real estate with the payment of his simple contract debts, would or would not the executor be bound in due course of administration to pay those debts out of the personal estate, though, if they had not been so charged, they would have been liable to the effect of the Statute of Limitations?]
 —If there was sufficient of the personal estate he must pay them, unless the statute had actually run and he chose to plead it. With one exception, real estate is exempted from the payment of simple contract debts; but the testator is allowed, if he thinks proper, to make the real estate applicable to the payment of them. In *Andrews v. Brown* (f) there was a distinct promise to pay all persons who came to the defendant and made out that they had debts owing to them from the deceased. There is no such promise here. On the contrary, the advertisement expressly reserves the right to the advertiser or her legal advisers, to reject the claim that may be sent in. The trust considered as an authority for the payment of all debts whatever is simply void. The defence of the Statute of Limitations, which it is clear the executors might set up at law, for here they did set it up and the plaintiffs withdrew from the action, they may also set up in equity.—[Lord *Brougham*: Suppose that a man charges his debts upon his real estate, and it turns out that he has none, but the creditors, believing him to have real estate, lie by and allow the statute to run; would it not be a great hardship, and one which equity

(f) Prec. in Chan. 385.

would not inflict on them, to deprive them of all remedy for their debts?—It would not; they ought to have enforced their rights within the time limited by law; not having done so, they must abide by the legal consequences of their own neglect.—[Lord *Lyndhurst* (Lord Chancellor) (*g*): When a man devises a real estate, subject to the payment of his debts, does not that show that he intends that his executors shall not take advantage of the Statute of Limitations; and if so, is not his intention to be carried into effect?—The rules of law must still be followed, especially where they are those of a clear and positive statute. His implied intention cannot contravene them.—[Lord *Brougham*: A man may renounce the benefit of the statute in his lifetime; may he not do so at his death by his will? Cannot a man say, “I direct my trustees to pay debts that are barred by the statute;” and is not such a direction enforceable against the trustee?—The proceedings would be against the executor, and not against the trustee. Even admitting that the testator may do what the second part of the question supposes, still the point here is, whether the testator has done it. It is only a circumstance from which an inference may be raised; it is not a distinctly declared intention.—[Lord *Lyndhurst*: Certain consequences would have followed if this had been real estate. It was the testator’s intention that, with respect to real estate, the Statute of Limitations should not be set up as an answer to the claim of debts. It now appears that the estate was not real, but personal. Suppose the testator had declared that the executors should not, with respect to personal estate, set up the

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(*g*) The case was argued in the House of Lords on Tuesday 17, and Tuesday 24th March 1835, during the time when Lord Lyndhurst for the second time held the Great Seal.

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statute, could they have done it?—That question does not now require an answer, nor perhaps is it capable of receiving a decisive one; for there is no case whatever in which a testator has so distinctly expressed himself that the statute shall not run; that consequence has flowed from other causes.—[Lord *Lyndhurst*: But if there are consequences which the testator knew would flow from certain things, must he not be taken to have intended that such consequences should flow from them?—There are no words here declaring that the statute shall not apply to the debts to which the personal estate is liable. The House cannot supply them. The law has said that certain events shall take place in a particular way, and no mistake of the testator can alter that rule of the law. The defence of the statute is equally available, whether the period of limitation occurred before or after the death of the testator.

Mr. *Rolfe* and Mr. *Farrer* for the Respondents:—It may be contended here, that it being competent to the testator, after all legal demands on the personal estate are satisfied, to dispose of the residue by way of bounty to such individuals as he may think fit to select, it is competent to him to select those creditors who have a moral demand upon him, though their legal demand is barred by the statute; or that, as it is competent to every individual, in his lifetime, to waive the benefit of the Statute of Limitations, so may a testator waive it in his will, so as to prevent its operation after his decease upon the claims of his creditors. All the cases on this subject were fully discussed in the Court below. *Fergus v. Gore* (*h*) was one of those cases. There Lord Redesdale laid down this clear rule: “That a devise in trust for the pay-

(*h*) 1 Sch. & Lef. 107.

ment of debts does not prevent the setting up the statute if the time had run before the testator's death; for if it has run in the lifetime of the testator, the debts are presumed to be paid; but where a provision is made by will for payment of debts, the statute does not run after the death of the testator. It is an acknowledgment of the debt." Here the statute had not run at the death of the testator, and therefore the provision in his will prevents it from taking effect afterwards. To hold that the statute is not a bar here will not deprive the executor of any relief to which he may be justly entitled. The executor is not the trustee, but the representative of the testator, and he may relieve himself by showing that he has not the means of paying the debts. *Burke v. Jones* (i), was decided by Sir T. Plumer, after a consideration of all the cases. The doctrine in that case may well be admitted; but it does not affect the question now under discussion; for there the statute had taken effect before the death of the testator. After that came the case of *Hargreaves v. Michell* (k), where the statute had not run before the death of the testator, and it was held that after his death the statute would not affect a charge created in his will for the payment of his debts. In that case *Burke v. Jones* was expressly considered and approved of by the Vice-Chancellor. *Hughes v. Wynne* (l) is to the same effect. In *Rendell v. Carpenter* (m) the testator directed his trustees to stand possessed of the monies arising from the sale of his real and personal estate, after paying his debts, &c. The debt there sued for would have been barred by the Statute of Limitations, but that it was taken out of the statute by a letter of

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(i) 2 Ves. & B. 275.
(k) 6 Madd. 326.

(l) 1 Turn. & Russ. 307.
(m) 2 You. & J. 484.

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the testator's; and that being the case, the Court held, that not being barred at the death of the testator, it was continued to be kept out of the statute by the devise. The principle on which the Courts have gone has been this, that where the testator created a trust for the payment of debts, that must be taken to mean of all debts which are debts at the time of the testator's death. It is clear that a testator can create a trust of personal estate for the payment of his debts. In the present case the trust created must of necessity apply to the personal as well as to the supposed real estate, either because the will means payment of all debts out of the personal estate, where there is no statutable bar, or because the testator may have chosen to do by his will what he might have done in his lifetime, namely, waive the benefit of the statute. The testator here imagined that the estate was a fee simple: it turned out to be only leasehold. Surely, however, it was competent to the testator to create a trust of the personal estate, if he used adequate words for that purpose. His intention to do so here is manifest; and to hold that the Respondents are not entitled to the same benefit to which they would have been entitled, had the testator properly described his own estate, would be to enable executors to evade effecting their testator's intentions, or testators to mislead and defraud their creditors at their pleasure. Here the six years had elapsed, when the sale of the estate for the first time made every one aware of the fact that it was leasehold. The Respondents then immediately commenced proceedings at law, and were met by a plea of the Statute of Limitations. It appears therefore that the Respondents were actually misled by the terms of the will but at all events, the terms of it were calculated to mislead them. But independently of these general

circumstances, the testator here has done something which enables his creditors to pursue his estate in the hands of his executors, and there is no authority to show that they are not entitled to enforce the right thus given them.

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Mr. *Knight*, in reply:—There is no authority for saying that a debt once barred by the statute, no matter at what time that event takes place, can ever be revived. And it is against the first principles of the law, to contend that creditors may delay as long as they please the enforcement of their demands, merely because they think that the testator has subjected his real estate to the payment of them. The creditor, should such a supposition turn out to be incorrect, cannot transfer the burden of his debt to the personal estate merely because of his own laches. The advertisement here is not an acknowledgment of the debt, so as to take it out of the Statute of Limitations. There is a well known distinction in our law between real and personal estate; on that distinction the House will act, and will not apply to this case a rule different from that which is applicable to ordinary cases, merely because the testator was in error as to the nature of the property he possessed.

Lord *Brougham*:—This case is worthy of particular consideration. It is certainly true that the Courts, both of law and equity, have ever endeavoured to give effect to the Statute of Limitations, and to narrow the means of taking cases out of the operation of that statute.

Judgment postponed.

Lord *Lyndhurst*:—In a case of *Scott v. Jones*, which was heard a considerable time back, the judgment has, from accidental causes, been hitherto postponed. The

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facts of the case are extremely simple, and the question resolves itself into a mere question of law. It appears that, in 1815, Messrs. Evans & Jelf carried on business in partnership, as bankers, at Gloucester. In that year they became bankrupts, and their effects were assigned under their commission to assignees in the usual manner. Mr. R. Donovan had a running account with the bank, and there was a balance against him at the time of the bankruptcy to the amount of 262 *l.* 4*s.* 3*d.* R. Donovan in the same year made his will, and by that will he disposed of the personal estate he possessed to trustees, for the payment of his debts; and he also devised to the same trustees, what he considered to be his real estate at Tibberton-court; and he directed that in the event of the personal estate not being sufficient to discharge the debts, a sum should be added for that purpose, to be raised by the sale or mortgage of the real estate of Tibberton. He died in the following year; one of the trustees alone proved the will, the other renounced. The trustee who proved the will administered part of the assets and soon afterwards died, and the ultimate administration *de bonis non* was granted to one of the Appellants, the daughter of R. Donovan. She shortly afterwards put an advertisement into the Gloucester paper, directing all persons who either had or conceived themselves to have any claim against the estate of her father, to send in an account of those claims to Messrs. Bubb, who were attornies carrying on business at Cheltenham. In consequence of this advertisement, the assignees of the bankrupt sent in their demand, amounting to the sum of 260 *l.*, against this estate. It appears that no notice was taken of this demand, in consequence of which, the assignees commenced an action against Mrs. Scott, one of the Appellants, and her husband. To this action the

defendants pleaded the Statute of Limitations, and there were then no further proceedings taken in the action. There cannot be a doubt, that that was because the Statute of Limitations was a sufficient bar to the action, there being nothing whatever to take the case out of the statute, this advertisement clearly not being attended with that effect. In consequence of that, the present bill was filed, demanding an application of the trust funds in payment of the debts of the testator. The defendants, in their answer to this suit, insist on the Statute of Limitations, and the only question is, whether the trust was of such a nature as to prevent the setting up of such a defence. I have mentioned that the testator considered the estate at Tibberton to be real estate. When sold, however, it turned out to be mere leasehold, and to form part of the personalty. Had it been real estate, in that case the plaintiff would have been entitled to recover, but though part of the personalty, it is said to be taken subject to the trust, and the question is, whether a trust of this description declared of the personal estate, prevents the Statute of Limitations being set up by way of defence, and I am clearly of opinion that it does not, because it does not at all vary the legal liability of the parties, or make any difference with respect to the effect and operation of the statute itself. The executors take the estate subject to the claim of the creditors: they are, in point of law, the trustees for the creditors; the trust is a legal trust, and there is nothing whatever added to their legal liabilities from the mere circumstance of the testator himself declaring in express terms, that the estate shall be subject to the payment of his debts. I conceive therefore, that the circumstance of there being an express trust in this case, does not make any alteration with respect to the

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question. And if in ordinary circumstances, as to personalty, where there was a mere legal liability, the existence of a mere legal trust would not have been an answer to a plea of the Statute of Limitations; so I conceive that in the present case no alteration can take place, from the existence of an express trust, and that that trust cannot under these circumstances be considered as an answer to the statute. I am of opinion, therefore, that the judgment of the Master of the Rolls was the correct judgment, and that the judgment of the late Lord Chancellor, reversing it, ought to be set aside. As, however, two learned judges have entertained different opinions on this point, the decree of the Court below must be set aside without costs.

Judgment reversed without costs (n).

(n) Lord Cottenham (Lord Chancellor) adopted and acted upon this judgment in a case of *Freake v. Craneveldt*, 3 Myl. & Cr. 499.

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APPEAL

FROM THE COURT OF CHANCERY.

1837.

Feb. 28.
July 17.SAMUEL PAGE - - - - - *Appellant.*MARY LINWOOD - - - - - *Respondent.*

and

SAMUEL PAGE - - - - - *Appellant.*REBECCA BROOM, HERBERT BROOM, } *Respondents. (a)*
and Others - - - - - }

B. mortgaged certain premises to L. The premises were required to be partly pulled down and rebuilt: P. undertook to perform the work, but required security for the payment. An agreement was entered into between B., L. and P., by which L. consented to become tenant of part of the premises when rebuilt, and to take a lease of them from P., to whom B. had assigned his interest for a term of years, and to pay P. 1,000 *l.* for the lease, and 250 *l.* a year for rent. The premises having been rebuilt, L. entered into possession, but as no lease was granted by P., did not pay the 1,000 *l.* nor the 250 *l.* a year rent. In a suit afterwards instituted by P., and to which both B. and L. were parties, Held, that the accounts of what was due to L. on the mortgage were not to be taken with annual rests, as the accounts on the other side could not be taken in the same manner either as to the 1,000 *l.* or the 250 *l.* a year rent: Held also, that L.

Mortgage.
Accounts.
Annual Rests.

(a) The points decided in these two cases are so connected together, that it has been deemed necessary, in order to avoid a useless repetition of the facts, that the circumstances of both cases should be arranged in one continuous statement. The arguments and judgment in each case are given separately.

The cases in the Court below are reported, 4 Russ. 6, and 2 Russ. & Myl. 214.

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was a mere tenant, and though at the same time a mortgagee, was not mortgagee in possession, the possession being in respect of the tenancy and not of the mortgage, and the agreement not having the effect of changing the relative situation of the parties in that respect.

IN June 1806, the late Mr. Thomas Willows was seised in fee simple of Saville-house, in Leicester-square, with the buildings belonging thereto, and of certain premises in Lisle-street, behind the same, subject to a mortgage in fee for 6,000 *l.*; which mortgage was vested in the late Mr. Richard Samuel White, and the Respondent Richard Rosser, in trust as to 3,000 *l.* for Mary Linwood, and as to the remaining 3,000 *l.* for Messrs. John and Herbert Broom.

Messrs. John and Herbert Broom had been for some time tenants under Mr. Willows of a part of Saville-house and of certain buildings behind it, and Miss Linwood had treated with Mr. Willows for the purpose of having certain exhibition rooms for her use erected behind Saville-house, on the site which was then occupied partly by the buildings in the possession of Messrs. Broom, and partly by stables and coach-houses, and it had been agreed between those three parties that Mr. Willows should cause the coach-houses and stables and other buildings behind Saville-house, including those occupied by Messrs. Broom, to be pulled down, and new buildings to be erected on the site, and that four rooms on the first and second floors of the new buildings should be let to Messrs. Broom in lieu of the buildings occupied by them, which were to be taken down, and that other parts of the new building should be let to Miss Linwood.

The Appellant was the builder applied to by Mr. Willows for the purpose of doing the work, and it not being convenient to Mr. Willows to pay at once the whole expense, the Appellant undertook to execute the work upon an agreement afterwards entered into between them, and which was to the following effect.

Articles of agreement, dated the 27th of June 1806, were made between Thomas Willows, Mary Linwood, John and Herbert Broom, Richard Samuel White and Richard Rosser of the one part, and Page of the other part, whereby Willows, Mary Linwood, J. and H. Broom, with the privity and consent of White and Rosser, and in consideration of the covenants and agreements therein contained, on the part of Page, agreed with him that they and all parties claiming under them would, on or before the 25th of March 1807, or so soon as the buildings should be completed, join in a lease to him of the premises therein described, subject to certain reservations therein mentioned, for a term of forty-nine years, from the 29th of September 1806, at a rent of 40 s. a year, to be paid to White and Rosser, their heirs and assigns, as trustees, and they agreed that the Appellant should have liberty to enter upon the premises, and pull down the old buildings and sell the materials; and that, so soon as the buildings thereafter covenanted to be erected by the Appellant, should be covered in, he should be entitled to interest at 5 l. per cent. upon the value of the shell of such new buildings, and that as soon as they should be completed agreeably to his covenant, he should be entitled to a commission of 5 l. per cent. upon the value of the whole of the new buildings, according to a valuation; and that, as soon as the intended new buildings should be completed, and part thereof granted by lease to Miss Linwood, she should pay unto

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the Appellant, over and above the yearly rent of 250*l.* to be reserved in the underlease to her, the sum of 1,000 *l.* by four half-yearly instalments, commencing the 24th June 1807, without interest. The Appellant agreed to pull down the old buildings, and to render an account of the materials to Willows, and to complete the new works on or before the 25th of December 1806, according to certain plans and specifications therein referred to, and that he would, upon the lease being executed to him, grant to Miss Linwood an underlease of the apartments to be occupied by her for the term of forty-eight years and three-quarters, from the 25th of December, 1806, if the buildings should then be completed, at the rent of 250 *l.* a year, payable half yearly; and it was agreed by Willows that certain rooms should be erected for J. & H. Broom, in lieu of other rooms which had been given up by them for the accommodation of other parties, and Willows agreed with the Appellant, to take from the Appellant a lease of the residue of the new buildings not occupied by Miss Linwood, or reserved for Messrs. Broom, for the same term of forty-eight years and three-quarters, at a rent of 200 *l.* a year, from the 25th March 1807, and payable half yearly; and it was further agreed between the Appellant and Willows, that the Appellant should, after the intended new buildings should be completed and valued, keep regular accounts of all sums received by him under the agreement, and strike a half yearly balance, and produce accounts and vouchers to Willows, his heirs, &c. and that when the amount of the value of the new buildings, and other compensations to be allowed to the Appellant, pursuant to these several articles of agreement should be ascertained, such principal sum, with interest thereon from that

time, after the rate of 5 *l.* per cent. per annum, should be allowed to the Appellant, and the amount of all subsequent valuations with interest thereon after the rate aforesaid, from the respective times of making the same, should also be allowed to him out of the sum of 1,000 *l.* to be paid to him by Mary Linwood as aforesaid, and out of the yearly rents of 250 *l.* and 200 *l.*, so to be paid to him by Mary Linwood and Willows respectively; and from and after all such sums of money with interest, and all incidental costs, charges, and expenses to be incurred by the Appellant, his executors or administrators, relating to the premises, with interest thereon after the rate aforesaid on such respective sums, from the times of making such valuations and statements as aforesaid, should be fully accounted for to the Appellant, by the means aforesaid, he should and would assign or surrender unto Willows, as he should direct, the lease so agreed to be granted to him, together with the benefit of the under-leases to be granted to Mary Linwood and Willows, the Appellant being indemnified by Willows against all covenants and agreements to be entered into by him with Mary Linwood and Willows in the leases so granted to them.

On the 2d of August 1806, an indenture of four parts was executed between Willows of the first part, Mary Linwood of the second part, Richard Samuel White and Richard Rosser of the third part, and John and Herbert Broom of the fourth part, whereby the other parties joined in demising to Messrs. Broom the premises which they then occupied in Saville-house, and also the four rooms which they were to occupy in the new buildings, for a term of forty-nine years and a half, from the 25th of March 1806, at an annual rent of

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375 *l.*, to be paid to White and Rosser until the mortgage of 6,000 *l.* was discharged, and then to Willows.

The Appellant entered upon the premises, and pulled down the old buildings, and built upon the site certain apartments which have been since occupied by Miss Linwood, and certain other rooms and apartments, but he did not, as Messrs. Broom contended, do such works as he had agreed to do, and the performance of which they alleged to be a condition precedent to his being entitled to the lease agreed to be granted to him under the agreement of the 27th of June 1806.

In the year 1813, Mr. Willows died intestate, and Messrs. John and Herbert Broom and the late Mr. John Harris, who was then their partner, purchased from Mr. John Willows, the son and heir of Mr. Thomas Willows, all John Willows' interest in the buildings and premises, and by certain deeds executed in the month of December 1814, such interest was conveyed to Thomas and Peter Davey as trustees to secure certain payments to Eleanor Willows, Barbara Willows, and Jane Willows, and subject thereto in trust for the said John and Herbert Broom, and John Harris as tenants in common in fee.

Herbert Broom died in the month of April 1815, leaving the Respondent Rebecca Broom his widow and executrix, and leaving the Respondent Herbert Broom, then an infant, his heir at law.

In November 1818, the Appellant filed his bill in Chancery against John Broom, John Harris, Rebecca Broom, Herbert Broom, (the infant,) Mary Linwood, Eleanor Willows, Barbara Willows, Jane Willows, Richard Rosser, Thomas Davey, Peter Davey, Sarah Monroe Sankey, Daniel Sutton, John Hanbury, and others, as defendants; wherein, after stating the effect of

the indentures of the 14th and 15th of May 1804, and 26th and 27th June 1806, and the agreement of the 27th June 1806, and lease to Messrs. Broom of the 2d August 1806, and further stating that by a certain other indenture, dated the 20th September 1806, and made between Thomas Willows of the first part, and Messrs. White and Rosser of the other part; after reciting the agreement of the 27th of June 1806, and the lease of the 2d of August 1806, and the mortgage debt of 6,000*l.* and a certain other mortgage debt due to a Mr. and Mrs. Browning, Thomas Willows appointed Messrs. White and Rosser to be receivers of the rents and profits of the premises, and thereout to pay all taxes and charges, and next to pay the interest on the 6,000*l.* mortgage, and then to pay the interest on Browning's mortgage, and all other incumbrances, if any, and to pay the residue, first in discharge of the principal of the mortgage of 6,000 *l.*, and then in discharge of Browning's mortgage. The bill further stated, that by another indenture dated the 30th September 1806, and made between Thomas Willows of the first part, and the Appellant of the other part, whereby, after reciting the several mortgages affecting the premises, and the agreement of the 27th of June 1806, and that it was uncertain whether the premises which Thomas Willows was to take on lease from the Appellant would always produce a clear rent of 200 *l.* a year, Thomas Willows directed White and Rosser, after paying off the 6,000 *l.* mortgage and interest, and the mortgage debt and interest to Browning, to pay the rent of 200 *l.* to the Appellant, or so much thereof as he, Thomas Willows, should not otherwise pay and satisfy; and further stating, that the Appellant proceeded to pull down the old buildings and to rebuild the same, and had expended large sums of money in

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so doing, and from time to time, according to the agreement, delivered to Thomas Willows, John and Herbert Broom, and Mary Linwood, accounts of the works he had done and of what was due to him in respect thereof, and that such works were upon each occasion duly examined and valued, and that it appeared from the last of those accounts, that there was due to the Appellant on account of such works, on the 25th of March 1809, the sum of 13,290*l.* 1*s.* 6*d.*, and that certificates of that amount had been drawn up and signed by Thomas Willows; and that in the course of such works it became necessary to make alterations and to build upon other parts of the premises beyond the site of that part agreed to be demised to the Appellant, and that all the works were considered as one, and only one account thereof was kept; and that, in the course of such works, Thomas Willows requested him to make other alterations and repairs upon the same premises, and that he had made some of such alterations and repairs, and that he was desirous of having some further security for the money which he should expend, and for what would become due to him in respect of such intended rooms, and that Thomas Willows, in consequence of such request, and in consideration of such additional works, agreed to charge the premises with the further sum of 200*l.* per annum, in addition to the former sum of 200*l.* per annum which had before been granted.

The bill further stated that Thomas Willows executed a deed poll dated the 26th of November 1807, and endorsed upon the indenture of the 30th of September 1806, whereby, after reciting that the Appellant had, at the request of Thomas Willows, advanced considerable sums to Mr. Boyd, which had been expended or applied towards the improvement of Saville-

house and adjoining premises, and had also been put to great expense in making alterations in the old part of Saville-house, which were not included in the agreement of the 27th of June 1806, and that it had been agreed between the Appellant and Thomas Willows, that in compensation for and in satisfaction of such alterations, the Appellant should receive the principal yearly sum of 200 *l.*, in addition to the 200 *l.* mentioned in the indenture of the 30th September 1806, making together 400 *l.* a year for the term therein mentioned, Thomas Willows directed that White and Rossers should, out of the surplus rents and profits, after answering the purposes mentioned in the indenture of the 30th of September 1806, for the residue of the Appellant's term, pay the further yearly sum of 200 *l.* over and above, and in addition to the yearly sum of 200 *l.* mentioned in the indenture, which additional yearly sum the Appellant thereby covenanted to accept in full compensation of the alterations. The bill further stated, that Willows afterwards agreed to grant to the Appellant a further term of fifty years in the premises, as a further security for his demands, and that he thereupon wrote a letter to White and Rosser, dated the 18th of August 1808, to that effect; it was further stated, that disputes had arisen between Thomas Willows and Miss Linwood, and that another agreement was entered into on the 21st November 1808, and made between Miss Linwood of the first part, Willows of the second part, the Appellant of the third part, and White and Rosser of the fourth part; whereby it was, among other things, agreed that the rooms intended for Miss Linwood should be completed according to certain plans and specifications annexed to that agreement, on or before the 1st of January 1809, or so soon after as Mr. Boyd should certify that the same might

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be completed if due diligence were used, and that within seven days afterwards all parties should join in a lease to the Appellant of the ground premises and buildings intended to be leased to him by the agreement of the 27th June 1806, with such variations as had taken place in the formation of any such buildings, for the term of forty-eight years from the 29th of September 1807, at the rent and subject to the covenants specified in the first agreement; and that, thereupon, the Appellant should grant a lease to Miss Linwood for a term of forty-seven years and three quarters, from the 25th December 1807, at the annual rent of 250 *l.*, and should be paid the 1,000 *l.* by Miss Linwood, by four half-yearly instalments, commencing on the 25th March 1809, without interest, and Miss Linwood then engaged to re-grant to the Appellant the rooms over her exhibition-rooms, and also a cellar, for her term therein, at a pepper-corn rent. The bill further stated, that the works were completed on the 25th of March 1809, and that at that time there was due to the Appellant, in respect thereof, the sum of 13,290 *l.* 1*s.* 6*d.*: and that possession had been taken of the premises by the parties therein mentioned, and it stated the death of Thomas Willows, and the conveyance, by the said John Willows, the heir, of his interest to Messrs. Broom and Harris, and the death of Herbert Broom, and of Richard Samuel White.

The prayer of the bill was that an account might be taken of what was then due to the Appellant, under or by virtue of the agreements or otherwise, and that the agreements might be specifically performed and carried into execution; and that a lease of the premises might be executed by all necessary parties, the Appellant being ready and willing to do all things to be done therein, on his part, and

that an account might be taken of what was then due from the defendant, Mary Linwood, in respect of the sum of 1,000 *l.*, so agreed to be paid to the Appellant, with interest thereon from the time the same ought to have been paid; and also in respect of the annual rent of 250 *l.*, with interest, from the times such annual sums ought respectively to have been paid; and that what should be so found to be due might be paid to the Appellant, and that he might be declared to have a lien on Mary Linwood's estate and interest in the premises for the payment thereof, and that the same might be raised and paid thereout, accordingly, in reduction of the Appellant's demand; and that an account also might be taken of what was then due in respect of the two annual sums of 200 *l.* and 200 *l.*, so agreed to be paid by Thomas Willows, together with interest thereon from the times the same ought respectively to have been paid, and that the Appellants might be declared to have a lien upon all the estate and interest of and in the premises for payment of what should be so found to be due, together with so much of the Appellant's demands as should remain unpaid by the means aforesaid, and that the same might be raised and paid thereout to the Appellant accordingly; and that the Appellant might have the full benefit of the securities for the payment of what was so due to him, and, if necessary for that purpose, that such of the rents and profits of the premises, if any, as were not applicable to the payment of the Appellant's aforesaid demands, might be applied in discharging all such incumbrances upon the premises as had priority to the Appellant's demands, and that the mortgage debt due to John and Herbert Broom might be considered as satisfied, to the amount of the rents and profits of the premises

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received by them, and of the occupation value of such parts of the premises as had been occupied by them, and that accounts of such rents and profits and occupation value might be taken accordingly, and that all other necessary directions might be given for the purpose of paying or securing to the Appellant the payment of what was so due to him out of the premises, and that some proper person might be appointed receiver of the premises, and particularly of such parts thereof as were so agreed to be demised to the Appellant for securing his demands, and that the rents and profits thereof might be applied according to the provisions of such agreements, and for general relief.

To this Bill the defendants appeared and put in their answers, witnesses were examined on both sides, and the cause came on for hearing in the month of November 1827, before Sir John Leach, then Master of the Rolls, and the following decree, bearing date the 27th day of November 1827, was made by him.

His Honor did declare that the plaintiff was entitled to have the lease to him, the two several leases from him, and the underlease from the defendant, Mary Linwood, to him executed by all proper parties, according to the drafts prepared by Mr. White in the year 1809, and approved of on the part of the plaintiff, with this difference, that the lease thereby proposed to have been made by the plaintiff to Thomas Willows, was to be made to John and Herbert Broom, and John Harris, or those who represented them, who, by virtue of the agreement in the pleadings mentioned, as between Thomas Willows and John and Herbert Broom, and John Harris, were entitled thereto, and with this difference also, that if the mortgage to Broom should appear to be satisfied, the plaintiff Page was entitled to have the lease granted to him for the additional

term of fifty years at the rent of 40 s. per annum ; and it was ordered, that all proper parties should execute the same and counterparts thereof: and it was further ordered, that as soon as such lease should have been executed to plaintiff as aforesaid, the said plaintiff should forthwith grant and execute to the said defendant, Mary Linwood, a demise of the said premises agreed to be let to her according to the lease prepared by Mr. White, at the annual rent of 250 l., according to the agreement of the 21st November 1808 ; and his Honor did declare, that upon such lease being executed by the plaintiff, the plaintiff would be entitled to receive from the defendant, Mary Linwood, the sum of 1,000 l., agreed by the agreements of 27th June 1806, and 21st November 1808, to be paid to him, with interest on the same, after the rate of 4 l. per cent. per annum, according to the instalments, and from the respective times when such instalments were to have been paid, according to the agreement of the 21st day of November 1808, and the draft of the lease prepared by White.

The order went on to state, that the Master, in rotation, should take an account of what was due for principal and interest in respect of the said sum of 1,000 l. as aforesaid: and it was ordered, that the Master should also take an account of what was due from the defendant, Mary Linwood, to the plaintiff, in respect of the rent of 250 l. per annum, from the 25th day of December 1807, being the time from which such rent was reserved and made payable in and by the draft lease prepared by Mr. White, and the Master, in taking such last-mentioned account, was to make unto the said Mary Linwood all just allowances for and in respect of all or any rates taxes, assessments, and other proper disbursements

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paid, laid out, assessed, and made upon or by her: and it was ordered, that the Master should take an account of what was due to Mary Linwood for principal and interest, in respect of her mortgage in the pleadings mentioned; and also an account of the costs, charges, and expenses which she had paid, been put to, or sustained in certain suits, brought against her as mortgagee, or in anywise incidental to or respecting the said mortgage: and it being alleged by the counsel for the plaintiff, and for Mary Linwood, that it had been agreed that the plaintiff should become the assignee of the said mortgage, it was ordered that the difference between the amount of the account of the principal, interest, and costs of the mortgage, and the amount of the accounts of the rent, and of the before-mentioned sum of 1,000 l. and interest, after making such allowances thereout as aforesaid above directed to be taken, be paid by the plaintiff to Mary Linwood, or be paid by her to the plaintiff, according to the result of the balance between such accounts; and if it should be found that the mortgage debt, with interest and costs, was satisfied, or upon the balance of such mortgage account being paid to Mary Linwood by the plaintiff, and such under lease being executed to Mary Linwood by the plaintiff, Mary Linwood should thereupon transfer and assign her mortgage unto Samuel Page, as he should direct, and all proper parties were to join in such transfer and assignment, which was to be settled by the Master in case the parties differed about the same: and it was ordered, that the Master should tax Mary Linwood her costs of suit, as between solicitor and client, and that the plaintiff should pay the same unto Mary Linwood; and it was ordered that, thereupon, and upon her doing what she was thereinbefore directed to do, the plaintiff's bill should stand dis-

nd out of this Court, as against her: costs were
ved, and his Honor did declare that the plaintiff
t to be considered as having a charge upon the
al premises in the pleadings mentioned for the
ose of supplying the deficiency (if any) of the rent
00 *l.* a year, to be reserved to him by the lease
e mentioned, which was agreed to be granted to
nas Willows; and also for the payment of an
ional sum of 200 *l.* per annum during the term of
-eight years and three-quarters of a year, wanting
ays, mentioned in the deed poll of the 26th day of
ember 1807, or until such time as the plaintiff's
unds were satisfied, and to have a proper deed
uted for that purpose; but such charge was not
ke effect until it should appear that the mort-
which was held by Herbert and John Broom was
ied; but in case it should appear that such last-
ioned mortgage was satisfied, then it was ordered
the Master should settle and approve of a proper
for securing such two rents charge accordingly;
in case it should appear that such last-men-
d mortgage was satisfied, then it was ordered that
Master should compute interest upon the sum of
90 *l.* 1*s.* 6*d.* from the 25th March 1809, according
e acknowledgment of the said Thomas Willows,
l the 19th July 1810, after the rate of five per
per annum, and according to the agreement of
June 1806; but in case it should appear that
mortgage as last aforesaid was not satisfied, then
s ordered that such last-mentioned account be post-
d until the further order of the Court: and it was
er ordered that the Master should take an account
hat was due from John Broom and John Harris, or
x of them, or the estate of Herbert Broom, deceased,
e plaintiff in respect of the rent of 200 *l.* a-year.

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from the 25th day of December 1807, according to the draft prepared by Mr. White, and according to the agreement of the 27th day of June 1806, up to the date of the report ; and that the Master should also take an account of what was due from the defendants, John Broom, John Harris, or the estate of Herbert Broom, deceased, in respect of the rents reserved by the lease of the 2d day of August 1806, and the agreement of the 30th day of June 1808, and in respect of any other rents of the premises, or any part thereof received by either of them ; and that the Master should set an occupation rent on such part (if any) of the premises not included in such lease or agreement, of which either of them should have had a valuable occupation, or which would have produced rent, but for his wilful default, and ascertain what was due in respect thereof : and it was ordered, that what he should find due on such several accounts, or any of them, be set against what he should find due in respect of the principal and interest of the mortgage for 3,000 *l.*, which was vested in John Broom and Herbert Broom, deceased ; and should state, whether anything and what remained due upon such mortgage, and take the account of principal and interest on such mortgage ; and it was ordered, that the said Master should take an account of the rents received by Rosser, under the deed of the 20th day of September 1806 ; and his Honor did reserve the question, whether he was liable for any and what further portion of the rents and profits of the said premises ; and it was ordered, that the Master should also take an account of what rents and profits had been received by Rosser and Richard Samuel White, or by their order, or for their use, and the Master was to be at liberty to make a separate report or reports as to any of the matters

thereby referred to him, and to state any special circumstances at the request of either of the parties as he should think fit; and it was ordered, that the plaintiff should pay unto the defendants Eleanor Wil-
lows, Sarah Monroe Sankey, John Hanbury, and Da-
niel Sutton their costs of this suit, to be taxed by the
Master in case the parties differed about the same,
including the costs of all the former hearings: and it
was ordered, that thereupon the plaintiff's bill should
stand dismissed out of Court, as against the four last
named defendants, and his Honor reserved the con-
sideration of all parties costs so far as not therein-
before provided for, and also further directions, until
after the Master should have made his general report.

An appeal was presented against this decree, which,
by an order of the 22d December 1830, was partly
varied by Lord Chancellor Brougham, but was, as
to the main points, affirmed. In June 1832, John
Broom became bankrupt, and Thomas Ganderton,
Joseph Pitman, and Thomas Slatter, were appointed
his assignees, and were by a supplemental bill made
parties to the suit.

The Master made his general report in these causes,
dated the 10th day of May 1833, and thereby certified
that he found that there was due for principal and inte-
rest, in respect of the said 1,000*l.*, to the 26th day of
November 1827—being the day of the date of the decree
—the sum of 1,691*l.* 7*s.* 1*d.*, and that there was due in
respect of the said rent of 250*l.* per annum, from the
25th day of December 1807 to the 14th day of June
1827, being the last half-yearly day of payment pre-
ceding the date of the decree, the sum of 4,875*l.*, but
he found that Mary Linwood had paid in discharge of
certain rates, &c. in respect of the premises, several
sums of money, amounting together to the sum of

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1,016*l.* 8*s.* 2*d.*, which he allowed to Mary Linwood; and the same being deducted from the sum of 4,875*l.*, reduced the same to the sum of 3,858*l.* 11*s.* 10*d.*, which last-mentioned sum the Master found then remained due from Mary Linwood to the Appellant in respect of the rent of 250*l.*; and this sum of 3,858*l.* 11*s.* 10*d.* being added to the sum of 1,691*l.* 7*s.* 1*d.*, made together the sum of 5,549*l.* 18*s.* 11*d.*, due from Mary Linwood to the Appellant for principal and interest, computed as aforesaid: and the Master further certified that he found, that the whole of the principal sum of 3,000*l.*, being one moiety of the principal sum of 6,000*l.* remained due, with interest thereon, from the 27th day of June 1806, and that he had computed such interest at 5*l.* per cent. per annum from that day to the date of the decree; and he found that such interest, after deducting the property-tax payable in respect thereof to the 5th day of April 1816, amounted to the sum of 3,066*l.* 4*s.* 4*d.*, which being added to the said principal sum of 3,000*l.*, together with 13*s.* 4*d.* for costs incurred by her, made in the whole the sum of 6,066*l.* 17*s.* 8*d.*, which last-mentioned sum the Master found was due to Mary Linwood; and the Master further found that the sum of 516*l.* 18*s.* 9*d.* was due to Mary Linwood on the day of the date of the decree, and then remained due to her as the balance of these two accounts; and he taxed her costs at 606*l.* 6*s.* 9*d.* And the decree having declared that the plaintiff ought to be considered as having a charge upon the premises for the purpose of supplying the deficiency, if any, of the rent of 200*l.* a year, and of the additional 200*l.* a year on the forty-nine years' lease, or until such time as the plaintiff's demands were satisfied; and the Master

having been ordered to compute interest after the rate of 5*l.* per cent. on the sum of 13,290*l.* 1*s.* 6*d.*, from the 25th of March 1809, according to the acknowledgment of Willows, dated on the 19th of July 1810, and the agreement of the 27th of June 1806, the Master further certified that he had computed interest accordingly, from the 25th day of March 1809 to the 29th day of September 1827; which interest, together with the said principal sum of 13,290*l.* 1*s.* 6*d.*, amounted to the sum of 33,144*l.* 17*s.* 4*d.* And the said Master certified that he found that there was due from John Broom, and the estate of John Harris, deceased, and the estate of Herbert Broom, deceased, to the Appellant, in respect of the rent of 200*l.* per annum, according to the draft of the lease prepared by Mr. White, and according to the said agreement of the 27th day of June 1806, from the 25th day of December 1807 to the 29th day of September 1832, the sum of 4,950*l.*; and also the sum of 9,843*l.* 15*s.* in respect of the rent of 375*l.* per annum, reserved by the indenture of the 2d of August 1806, from the 24th day of June 1806 to the 29th day of September 1832; and also, in respect of the rent of 325*l.* reserved by the agreement of the 30th day of June 1808, from the 29th day of September 1808 to the 29th day of September 1832, being twenty-four years, the sum of 7,800*l.*; but he had deducted therefrom the original rent of 200*l.* per annum, during the said twenty-four years, amounting to the sum of 4,800*l.*, whereby the said sum of 7,800*l.* became reduced to the sum of 3,000*l.*; and also in respect of certain other rents of the premises, several sums of money, amounting together to the sum of 4,780*l.* 13*s.* 1*d.*; and also in respect of certain rents of the same premises, several sums of

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money, amounting to the sum of 955*l.*, to his report annexed; and also several sums of money in respect of occupation rents, amounting together to the sum of 832*l.* 6*s.* 8*d.*, and he found that these several sums amounted, in the whole, to the sum of 24,361*l.* 14*s.* 9*d.*, but he found that John Broom, John Harris, and Herbert Broom, or some or one of them, or some person by their order, or for their use, paid, &c. in taxes, rates, and otherwise, on account of the premises, several sums of money, amounting to the sum of 10,265*l.* 14*s.* 10*d.*, and he found that no part of such payments was at any time applicable to, or payable on, the rent of 200*l.* a-year; and in order to ascertain whether any thing remained due upon the mortgage for 3,000*l.* which was vested in John Broom, and Herbert Broom, deceased, he had proceeded to take an account of the principal and interest due on such mortgage, down to the period at which he found the same was paid off, as therein mentioned, and he found that such principal and interest amounted to the sum of 4,878*l.* 15*s.*, and he found that the rents and occupation rents which accrued due, prior and up to the 25th day of December 1819, amounted to the sum of 10,255*l.* 1*s.* 8*d.*, and he found that the payments and disbursements which were made and retained thereout, up to the same period, amounted to the sum of 5,305*l.* 12*s.* 5*d.*, which sum being deducted, left an ultimate balance of 4,949*l.* 9*s.* 3*d.*, due in respect of such rents and occupation rents, on the 25th day of December 1819, and which balance of 4,949*l.* 9*s.* 3*d.* exceeding the sum of 4,878*l.* 15*s.*, the amount due for principal and interest to that period by the sum of 70*l.* 14*s.* 3*d.*, he found that the mortgage must be considered as paid off on the 25th December 1819; and he found that the

rents and occupation rents which accrued due subsequent to the said 25th day of December 1819, including the aforesaid surplus of 70*l.* 14*s.* 3*d.*, amounted to the sum of 14,177*l.* 7*s.* 4*d.*, and that the aforesaid payments and disbursements subsequent to the 25th of December 1819, amounted to the sum of 4,960*l.* 2*s.* 5*d.*, and he found that no part of such last-mentioned sum was applicable to or payable out of the rents of 200*l.*, 375*l.*, and 325*l.*, or either of them, but that the whole thereof was payable out of the other rents thereinbefore mentioned, and the sum of 4,960*l.* 2*s.* 5*d.* being deducted from the sum of 14,106*l.* 13*s.* 1*d.*, left a balance of 9,146*l.* 10*s.* 8*d.*, in respect of all the aforesaid rents and occupation rents subsequent to the 25th day of December 1819, whereto being added the aforesaid sum of 70*l.* 14*s.* 3*d.*, they made together the sum of 9217*l.* 4*s.* 11*d.*; and he found that the sum of 4,409*l.* 19*s.* 11*d.*, part of such balance of 9,217*l.* 14*s.* 11*d.* was payable by John Broom, and the estate of John Harris, and the estate of Herbert Broom; and that the sum of 4,807*l.* 5*s.*, the remainder of such balance, was payable by John Broom, and the estate of Herbert Broom.

During the progress of the works upon the premises at Saville-house, Thomas Willows had been in great pecuniary embarrassments, and he had from time to time signed certificates of acknowledgment, by the last of which he acknowledged that the sum of 13,290*l.* 1*s.* 6*d.* was due to the Appellant, under the agreements on the 25th of March 1809 it appears that such accounts had been made up, by charging interest and compound interest on rests half-yearly, as well as other charges, to which the Respondents contended that the Appellant was not entitled, and at the hear-

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ing of the cause it was objected by the defendants, Broom and Harris, that such accounts and acknowledgments ought not to stand; but the Master of the Rolls held that such acknowledgment amounted to a settled account, and that such settled account could not be opened except upon a bill filed for the purpose.

In computing interest upon this sum of 13,290*l.* 1*s.* 6*d.* the Master made rests half-yearly, with interest upon interest, and the sum of 33,144*l.* 17*s.* 4*d.*, stated in the report, was found due to the Appellant upon such computation.

This mode of computation was made one of the exceptions to the report, taken by the Respondents, whose interest it affected. Several others were taken, and among them were some by Miss Linwood, who objected that the Master had only calculated interest on the 1,000*l.* and the 250*l.* rent, and on the mortgage money, 3,000*l.*, up to the date of the decree, and had only allowed disbursements made by her up to the same date, whereas he ought to have made all these calculations up to the date of his report.

All the exceptions came on to be heard before the Master of the Rolls on the 17th of July 1833, and his Honor over-ruled the exceptions taken by the other Respondents, but allowed those taken by Miss Linwood.

On the 25th of July 1833 the causes came on to be heard before the Master of the Rolls on the further directions, when his Honor did order that it should be referred back to the Master, to settle and approve of the lease to the plaintiff, which by the decree he is declared entitled to have executed to him, and also the lease from him, which by the decree was directed to be made to John Broom, Herbert Broom, and John Harris, or those who represent them, according to

the directions in the decree ; and in settling the leases the Master was to have regard to the circumstances and events which have taken place since the time when the drafts were prepared by Mr. White in the decree mentioned, and the relations in which the several parties stand ; and the assignees of John Broom disclaiming any interest in the under lease, his Honor declared that such under lease was to be made to Rebecca Broom, as administratrix of Herbert Broom, and John Harris, as the executor of John Harris, deceased ; and it appearing by the Master's reports that the mortgage of the defendant John Broom and Herbert Broom was satisfied, it was ordered that the Master should settle the lease to the plaintiff, for the additional term of fifty years, according to the declaration and direction in the decree contained, and that all proper parties should execute as the Master should direct : and it appearing that the mortgage to John Broom and Herbert Broom, deceased, was satisfied, it was ordered that it should be referred to the Master to settle a charge upon the several premises in the pleadings mentioned for the purpose of supplying the deficiency, if any, of the rent of 200*l.* a-year, to be reserved to him by the lease in the decree mentioned, which was agreed to be granted to Thomas Willows, and also for the payment of an additional sum of 200*l.* per annum, during the term of forty-eight years and three-quarters of a year, wanting ten days, mentioned in the deed poll of the 26th November 1807, or until such earlier time as the plaintiff's demands were satisfied : and it was ordered, that all proper parties should join in executing the same as the said Master should direct : and it was ordered, that the plaintiff should be continued receiver until the further order of the Court,

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with liberty to him to retain all sums received or to be received by him as such receiver, and he was to be allowed the same in passing his accounts before the Master; and it was ordered that the plaintiff should retain all sums received by him towards satisfaction of what was then due to him in respect of the arrears of the two annual sums of 200*l.* and 200*l.*, and what might become due in respect of such annual sums: and it was ordered that it should be referred to the Master to continue the account of the 200*l.* original rent, and also to take an account of what was due to the said plaintiff, in respect and on account of the said second rent charge of 200*l.* per annum, created by the deed poll of the 26th day of November 1807; and his Honor declared that Rebecca Broom and John Harris were liable to pay the sum of 4,409*l.* 19*s.* 4*d.*, the amount found due by the report of the 10th day of May 1833; and that Rebecca Broom was liable to pay the sum of 4,807*l.* 5*s.* found due by the report, towards satisfaction of what is due to the plaintiff in respect of the annual sum of 200*l.* of which an account had already been taken, and of the additional 200*l.* per annum, of which an account was thereby directed; and the defendant Rebecca Broom not admitting assets, it was ordered that she come to an account before the Master, and the plaintiff applying to have the accounts directed by the decree to be taken against the defendants John Broom and John Harris, and the estate of Herbert Broom taken with half-yearly rests, and the defendants, the accounting parties, admitting as a fact, that the result of such accounts would be to increase the balance found due from them to an amount exceeding what is due to the plaintiff in respect of the arrears of the two annual sums of 200*l.* and 200*l.*, his Honor did declare, that the estate of

Herbert Broom, and the estate of John Harris, the father, were severally liable to pay the full amount of what might be found due to the plaintiff in respect of the arrears of the said two annual sums of 200*l.*; and it was ordered, that the Master should continue the account of what was due to the plaintiff upon the principles already directed, and in such account the plaintiff was to give credit for the sums which he should receive in respect of the rents or otherwise, on account thereof; and it was ordered, that all the other accounts by the decree directed to be taken be continued, and his Honor reserved the consideration of all further directions, and of the costs of this suit, until after the said Master should have made his report, and any of the parties were to be at liberty to apply to this Court as there should be occasion.

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On the 23d of July 1833 the Appellant had presented a petition to the Master of the Rolls, praying that it might be declared that the Appellant was entitled to have the net amounts from time to time due from Mary Linwood in respect of the rent of 250*l.* per annum, after making to her all just allowances, applied in the first place in payment of the interest due on her share of the mortgage, or so much thereof as from time to time remained unsatisfied, and then in reducing the principal thereof, and that it might be referred to the Master to whom the causes stood referred, to take the accounts of what was due to her in respect of the mortgage, and what was due from her in respect of the rent of 250 *l.* upon that footing, and in taking such account, that the Master might be ordered to make half-yearly rests.

By the order dated 25th July 1833, it was ordered, with respect to this petition, that the accounts di-

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rected by the decree dated the 26th November 1817, as between the Appellant and the said Mary Linwood, and which accounts were, by the order made on hearing the exceptions on the 17th day of July then instant, directed to be continued down to the date of the Master's report, to be made under that order, should be taken with half-yearly rests. Against this order the defendant, Miss Linwood, appealed to the Lord Chancellor, who, on the 8th August 1834, ordered that the order made by the Master of the Rolls, bearing date the 25th day of July 1833, on the petition of the Appellant, should be, so far as she was concerned, discharged.

On the 13th of March 1834 the Appellant presented a petition of appeal to the Lord Chancellor, stating that he was advised that he was entitled to be placed in the same situation in respect of the two rents or rentcharges of 200*l.* and 200 *l.* per annum, as he would then be in if the same had been regularly paid from the beginning; and for that purpose a direction ought to have been contained in the order on further directions of the 25th day of July 1833, for taking the accounts of the two rents or rentcharges, with half-yearly rests, and that directions ought for the like purpose also be given for taking the accounts, which, by the said decree of the 26th day of November 1827, were directed to be taken against the defendants, John Broom and John Harris, and the estate of Herbert Broom, with half-yearly rests; and also stating, that the Appellant felt himself aggrieved by the order of the 25th day of July 1833, so far as such order did not direct that the account of what was due in respect of the first rent of 200*l.* per annum, of which an account was, by the decree of the 26th day

of November 1827, directed to be taken,—and of the second rent of 200*l.*, of which an account was, by the order of the 25th day of July 1833, directed to be taken,—should be computed with half-yearly rests; and the Appellant therefore appealed from the order of the 25th of July 1833, in the above particulars, and prayed that the causes might be reheard before his Lordship, on further directions in respect of such matters as were thereinbefore complained of.

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The defendants, Rebecca Broom and Herbert Broom, on the 30th May 1834, presented their petition of appeal to the Lord High Chancellor, and the petition stated, amongst other things, that they conceived themselves aggrieved by the order of the 17th of July 1833, overruling the exceptions taken by them to the Master's report of the 10th of May 1833, inasmuch as the said exceptions ought to have been allowed, and that the said Rebecca Broom and Herbert Broom were also aggrieved by the order on further directions of the 25th of July 1833, inasmuch as no order should have been made, except to direct the Master to review his report of the 10th day of May 1833, or, if any other order should have been made, it should have been only to continue the receiver, and to reserve further directions and costs, and that at all events none of the declarations or orders against Rebecca Broom should have been made in the said order of the 25th of July 1833.

The Respondents, Thomas Ganderton, Joseph Pitman, and Thomas Slatter, presented their petition of appeal to the Lord High Chancellor, stating, among other things, that they felt themselves aggrieved by so much of the order of the 17th of July 1833 as overruled the exception taken by them, and by so

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much of the order of the 25th day of July 1833, on further directions, as ordered as follows; that is to say, "And the plaintiff applying to have the accounts directed by the decree to be taken against John Broom and John Harris, and the estate of Herbert Broom, taken with half-yearly rests, and the defendants, the accounting parties, admitting as a fact, that the result of such accounts would be to increase the balance found due from them to an amount exceeding what was due to the plaintiff in respect of the arrears of the two annual sums of 200*l.* and 200*l.*, his Honor did declare that the estate of Herbert Broom, and the estate of John Harris, the father, were severally liable to pay the full amount of what might be found due to the plaintiff in respect of the arrears of the two annual sums of 200*l.* and 200*l.*, without prejudice to the right (if any) of the plaintiff, or of Rebecca Broom, to go in under the fiat against John Broom, and to make such proof as he or she might be able, against his estate, and without prejudice to the right (if any) of the plaintiff, or of Rebecca Broom, or of John Harris, the executor, to go in under the fiat against John Harris, the executor, and to make such proof as they, or any of them, might be able, against his estate; and it was ordered that the Master continue the account of what was due to the plaintiff, upon the principles already directed, and in such account the plaintiff was to give credit for the sums which he should receive, in respect of the rents, or otherwise, on account thereof."

These several petitions of appeal came on to be heard before the Lord Chancellor, in the month of November 1834, and an order was made by his Lordship, on the petition of appeal of the Appellant,

bearing date the 17th day of November 1834, that the Appellant's appeal should be dismissed, with costs.

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Upon the petition of appeal of the Respondents, Rebecca and Herbert Broom, an order was made by his Lordship, on the same day, by which he held the first exception of Rebecca and Herbert Broom to be good and sufficient, and did therefore order that the same should be allowed. And as to the petition of appeal of Miss Linwood, it was ordered that it should be referred back to the said Master to review his report of the 10th of May 1833, and in taking the accounts in the said cause, the Master was not to allow any compound interest on the original debt in the petition mentioned, or by way of half-yearly rests on the rents, to provide for the two rents of 200*l.* and 200*l.*, in the petition also mentioned, and in taking the accounts the said Master was to include the sums of 1,000*l.* and 250*l.* per annum, and 40*s.* per annum, in the petition also mentioned; and his Lordship affirmed the order of the 17th day of July 1833, as to the other exceptions of Rebecca and Herbert Broom, with the costs of those exceptions.

On the same day the Lord Chancellor made an order on the petition of appeal of the Respondents, Thomas Ganderton, Joseph Pitman, and Thomas Slatter, directing that, as to their exception, the order of the 17th day of July 1833 should be reversed; and it was ordered that it should be referred back to the Master to review his report of the 10th of May 1833, and in taking the accounts in the cause he was not to allow compound interest on the original debt, or by way of half-yearly rests on the rents to provide for the two rents of 200*l.* and

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200*l.* in the petition mentioned, and in taking the accounts the Master was to include the sums of 1,000*l.* and 250*l.* per annum, in the petition also mentioned.

The Appellant appealed to this House against so much of the order on further directions of the 25th of July 1833, as he had before complained of, and against the three last mentioned orders of the 17th of November 1834.

Mr. *Pemberton* and Mr. *Knight*, for the Appellant:—In this case the Respondent was to take a lease of the premises at 250 *l.* a year rent, and was to pay down 1,000*l.* on the lease being granted. It was contended on her behalf, that her lease gave her a right of priority over the Appellant's demand; but her interest was surrendered to him, and she was to take a lease from him. In that respect she was in precisely the same situation as the Messrs. Broom, the other tenants. An exception to the Master's report was taken by the Respondent before the Master of the Rolls, who allowed the exception so far as to declare that the account should have stopped at 1817, but he at the same time gave permission to the Appellant to present a petition for a hearing in the nature of further directions, that the account should be taken as in the case of a mortgagee in possession with annual rests. The Respondent by her own conduct had assumed that character, for she had contracted that, with respect to certain repairs and improvements, the builder should be repaid by receiving that part of the money to which she was entitled under the mortgage. There has been no delay in this case, so far as the Appellant is concerned, for the Appellant could not in-

stitute the suit till the mortgage to Broom had been satisfied. The decree here did not reserve further directions. The Master of the Rolls said that he would give the Respondent what she required, when she complained of the Master's report, if she would present a petition. Why was it necessary to present a petition? Because further directions were not reserved. It will be said that she was not the mortgagee in possession. But she was the mortgagee, and she was in possession; what is there peculiar in that circumstance? On the one hand she ought to have taken the money due to her till her claim was paid off, but, on the other, she cannot be allowed to retain 250 *l.* per annum belonging to another person, and at the same time charge him with interest on the money which she might have taken for herself. In practice it is clear that rests are often made after a decree when they have not been made in the decree itself, and this may be done when there are no further directions. In such a case the course of the Court is to do it on petition; it was so done here. In *Wilson v. Metcalfe* (b), it was held that after the time is ascertained at which a mortgage debt of a mortgagee in possession is to be paid off, annual rests from that date may be made in the account against such mortgagee, though rests were not directed in the previous orders and decrees under which those accounts were taken. It is clear therefore that rests here ought to be allowed.

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Sir *W. Horne*, for Miss Linwood:—The decree of the Lord Chancellor must be affirmed. The Respondent was a creditor for 3,000 *l.* on mortgage. The Messrs.

(b) 1 Russ. 530.

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Broom held the other moiety of the mortgage. It was then supposed that the property was capable of great improvement. The Respondent wanted rooms for her exhibition, and applied to Willows, who was the owner of the property. Though she was a mortgagee, she never was mortgagee in possession. She was mortgagee of the premises, and she became tenant of part of them under a special agreement, but that did not make her mortgagee in possession. The arrangement as to the improvement of the premises rested solely between Willows and Page. Page doubted whether Willows would have the means of paying him, and in consequence of that, the agreement was drawn up, which gave Page a certain interest in the premises, and he was to receive the rents, which were to be considered as instalments in payment of the debt Willows was about to incur. She was not a party to this, except so far as to consent that her mortgage was not to stand in the way of the payments to be made to Page. The arrangement made was quite independent of her rights as mortgagee. She was to have a lease of a part of the premises, and to pay 1,000*l.* for it, and 250*l.* a year rent. This agreement in which she joined, was the only transaction in which she was concerned with Page up to the time of the bill filed in 1827, and he himself does not in his bill affect to charge her as mortgagee in possession. If any one is to be blamed for the delay, it is Page himself, who might have obtained the 1,000*l.*, and the rent, if he had chosen to grant the lease according to the terms of the agreement. The attention of the Court was directed to the two distinct claims of interest on the rent and on the 1,000*l.* One was put on the matter of right, the other on the matter of agree-

ment. The common practice of the Court is, that where an account is directed in the manner in which it is directed here, it is not to be taken with rests, and it is not considered terminated till the Master has made his report. The decree declares that it had been agreed that he should become the assignee of the mortgage, and the account of the mortgage can only be satisfied by being taken till payment. The agreement only means that Page shall stand in the Respondent's place as to the mortgage, on paying her what is due. When he becomes possessed of the mortgage, it does not merge, for he does not become owner of the estate, but is a mere incumbrancer. When the case came before the Lord Chancellor in 1830, on appeal, Page did not ask for the account to be taken with rests, nor did he make any attempt to disturb the decree as to this Respondent, in consequence of which she withdrew from contesting the appeal, on the understanding that her costs should be paid, and that her rights under the decree should not be affected. The next proceeding was the Master's report. He was induced to limit the accounts to the date of the decree. An exception was taken by this Respondent on that ground, and the Master of the Rolls inclined to favour the exception, but gave the Appellant leave to raise the question on petition. It is clear that the accounts cannot be taken under the decree with rests. *Wilson v. Metcalfe*, does not apply to this case. That was a bill filed for the purpose of redeeming a mortgagee in possession, and the Master found that he had been overpaid, and there being further directions reserved, the only question was, what the Court would do. The Court made an order against him, as it was his own wilful default. In no one respect do the circumstances of that case

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and the present resemble each other. It is clear that annual rests cannot be directed as of course, but under special circumstances only, and never for a broken period: *Davis v. May* (c). The same rule was acted on in *Webber v. Hunt* (d).

Mr. *Pemberton*, in reply:—It is clear that from the time the Respondent took possession she was in the situation of a prior mortgagee to the Appellant, with the right of an immediate redemption existing in him. They never stood in the relative situation towards each other of landlord and tenant. The account therefore, is not an account of rent, and the Court had authority to order that it should be taken with rests, and the decree of the Master of the Rolls was consequently right.

Monday,
17 July 1837.

The *Lord Chancellor*:—This is one of two appeals (*Page v. Broom*, and *Page v. Linwood*) brought by Mr. Page against different parties, upon transactions relating to the same property. The Appellant in both cases complains of an order which was made in the Court below on exceptions and further directions. The circumstances which gave rise to contest between these parties arose from a contract, by which Mr. Page, in 1806, agreed, upon certain terms and conditions, to rebuild part of a house in Leicester-square. It appeared that there had been a mortgage upon the house in question, one-half of which was then vested in Miss Linwood. The object of this agreement was, to effect certain alterations in that house and some adjoining premises. For this purpose, Mr.

(c) 19 Ves. 383.

(d) 1 Mad. 13.

Willows being then the owner of the inheritance, and Miss Linwood being the holder of one moiety of a mortgage on the premises, and it being intended that she should occupy a certain portion of them, it was agreed that rent should be paid by her in respect of such occupation, by means of which Page might be repaid for the alterations. She was mortgagee of a moiety, and it was therefore agreed, prior to any contract between Willows and Page, that she should give up the right of priority in respect of her half of the mortgage. An agreement was then made, that the premises should be rebuilt, and that she should pay a rent in respect of the part she occupied to the amount of 250*l.*, and she was to have a lease, and on its being executed she was to pay a sum of 1,000*l.* Unfortunately a great length of time elapsed after the premises were finished before Page was able to obtain any remuneration for the money he had expended, and considerable difficulties arose from that circumstance. The building was not confined to the site or the works originally contracted for, but another agreement was made, which extended the liability of Willows, but could not affect the liabilities under which Miss Linwood was placed. The case came to a decree on 26th of November 1827.—[His Lordship here referred very fully to the decree.]—So far the decree had provided for taking an account of what was due to Miss Linwood in respect of the mortgage, and from her in respect of the contract for the payment of 1,000*l.* with interest, and the 250*l.* a year as rent. Then the decree took notice of an arrangement which had taken place between Page and Miss Linwood, in order to enable him to relieve himself from the difficulties with which he was pressed.—[His Lordship referred to it.]—This provision was not intended to

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alter the rights of the parties, except to this extent, that she should receive from Page, as he had contracted to purchase the property, the money due to her in respect of the mortgage, and as she had to pay Page the 1,000*l.*, with the interest on the instalments, the arrangement in effect was, that on finding what was due from Miss Linwood on the one hand, and from Page on the other, she should pay the balance. On the case coming before the Master of the Rolls (e) he took a certain view of the relative situation of the parties, and considered that Miss Linwood was to be treated in the character of a mortgagee in possession, and the order he made after the hearing was an order made treating her in that character. He directed rests to be made, the effect of which would be to remove so much of the mortgage debt as the rent of 250*l.* a year would be sufficient to pay. When the case came before Lord Chancellor Brougham (f) he took a different view of the matter, and thought that Miss Linwood could not properly be considered as a mortgagee in possession, and when your Lordships recollect in what situation these parties stood at the time of these payments becoming due, I think you will be of opinion that she could not be so considered, as the rent that Page had to receive was not the money of the owner of the equity of redemption. Willows was the owner of the rent, and there was a contract of purchase between Page and Miss Linwood, but not as between the mortgagor and mortgagee. Page entered into a contract by which, in respect of money to be paid from her to him, he agreed to purchase her rights, which must mean such as then were in existence. If she had sold to a stranger, he would have been entitled to receive what was due, in-

(e) 4 Russ. 6.

(f) 2 Russ. & Myl. 214.

dependently of what she owed to Page. I concur, therefore, entirely in this view of the case, and I do not see how it is possible to consider her as standing in any other character, than as a person agreeing to sell at that time what she was then entitled to receive as mortgagee from Willows and Page. Otherwise, this contract would alter the relative situation of the parties. Page was entitled to the equity of redemption, and Willows was the owner of the inheritance. I agree, therefore, with the order in the Court of Chancery, and this appeal being in part against that order, I have no hesitation in moving that, so far, that order be affirmed.

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There is another part of the appeal with respect to which I have felt more difficulty, but in which I also now concur with the judgment in the Court below. In taking the account of Miss Linwood's mortgage it appears that the Master stopped the account from the date of the decree. That was the subject of the exceptions, and the first was, that he ought to have carried on the account of principal and interest and rent down to the date of his report. The Master of the Rolls allowed the first three exceptions, and made an order to that effect on the 25th of July 1833. The present appeal raises these points, that if you should alter the decree of the Lord Chancellor, then you should remit the order made on the exceptions; that if she should be considered as the mortgagee in possession, then that the account ought to stop at the date of the decree. The effect of the report of the Master was, that the balance payable to Miss Linwood on the mortgage account exceeded what she was to pay to Page on the agreement for the lease. Then the question would be, whether, under the contract she had entered into, this account ought to stop at the

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date of the decree. If it is a mortgage account, then the party is entitled to have it taken up to the date of the mortgage being satisfied. But it is said to be a contract of purchase. If it is so, and the party selling would be entitled to the purchase-money and interest upon it, then Page would have to pay interest on the purchase-money, and then the ordinary rules of vendor and purchaser would apply. But most of the money does not bear interest; the rent would not, and the 1,000*l.* would not. It is hardly possible therefore to allow Miss Linwood to say that, as between her and Page, the account shall be taken on sums due to her which do bear interest, and that she shall have his account taken on sums due to him which do not bear interest, so as to exempt herself from the payment of interest while she throws such payment upon him. Balances were to be struck and payments to be made on one side or the other. The decree so prescribed, and the accounts were so directed to be taken. The order of the Master of the Rolls was so far correct. It cannot therefore properly be altered, except so far as it was altered in the Court below by the order of the Lord Chancellor, with respect to the annual rests. The appeal consequently fails on both points, and the decree must be affirmed on both.

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B., up to a certain period, made up half-yearly acknowledgments of the balances due from himself to P. On one occasion he gave an acknowledgment of a gross sum due from himself to P.; a part of the sum thus acknowledged to be due was formed of compound interest. B., by a subsequent agreement with P., bound himself to make up half-yearly

balances, and to pay the sums found due in respect of the building as the different parts of the work were finished and valued. B. did not keep up these payments. HELD, that when accounts were decreed, P. was not entitled to have them calculated with half-yearly rests, the agreement not necessarily giving him any such right, and the precedent of the acknowledgment not establishing this as a settled mode of dealing between the parties, if such a mode could be legal by agreement or by the practice of the parties.

Qu. whether it could be legal?

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Mr. *Knight* and Mr. *Wigram* for the Appellants :
—Unless this House should reverse the order of the Court below, a meaning must be given to the words ‘original debt,’ so as to affect the mode of calculating compound interest. The points for consideration now are, first, what is the amount of the debt due to Page; and, secondly, how much of it ought to be immediately paid him by those who have received the rents, which ought to have been employed the moment they were received in reducing his demand. The first question depends on the mode of taking the account, whether with or without interest and rests. The terms of the agreement show that it ought to be calculated with interest and rests.—[Lord *Brougham* : Can such an agreement be lawful?—It may be so under circumstances like the present. The parties acted on this agreement, and for some time made up half yearly balances; interest became due on those balances as they were made up. The original decree directs the Master to calculate interest upon a sum of 13,290*l.* 1*s.* 6*d.* according to the acknowledgment of Willows of the 19th of July 1810, and the agreement of the 27th of June 1806. That decree cannot now be departed from. The construction is inevitable that half yearly rests are to be taken on both sides; they

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can be taken in that manner on an agreement, and a course of dealing to that effect under such agreement is binding. The accounts here must therefore be taken with rests. Such is the agreement between the parties. The other parties may claim to have the account taken with rests; and, if so, then the Appellant has a right to an equal advantage. The order to take them in that manner was properly made on further directions: *Wilson v. Metcalfe* (g). The nature of the fund out of which the payments to the Appellant were to be made does not exclude the taking of the accounts in that manner. Though that fund was by consent constituted of the rents, still the debt is by agreement a debt with rests, and must be so treated from whatever fund the payment is to be derived. The rule on this subject is as old as the time of Lord Hardwicke: *Swynfen v. Scawen* (h). The order there was made on a rehearing. In *Lowndes v. Collins* (i), it was held that where there was a written contract for the payment of money on a day certain, interest became payable from that day; and that there was no difference in that respect between notes and other instruments. It may be admitted that it is not a general rule of the Court of Chancery to allow compound interest, but here the agreement is to that effect, and that agreement is not unlawful. The fund here is not rent but ordinary instalments of an ordinary debt, and therefore liable to interest. The debt is to be reduced by instalments, and if these are not duly paid the party is entitled to interest in respect of them. The giving of compound interest is not indeed a part of the stipulation, but is the necessary result of the terms of the agreement, and of the other par-

(g) 1 Russ. 530.

(h) 1 Ves. 99. Belt's edit.

(i) 17 Ves. 27.

ties not keeping faith with the Appellant in the gradual discharge of the debt. The decree was wrong in not giving interest on the instalments.

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Mr. Wakefield and Mr. Kindersley, (Mr. Teed was with them), for the Respondents:—The nature of the fund out of which the debt was payable does make a material difference. That fund was rent, and interest cannot be given on rent. The Appellant chose his own security, and he must take the consequences. The authority of *Swynfen v. Scawen*, and of *Lowndes v. Collins*, may be admitted, and yet the consequences contended for by the other side will not follow. The statute 3 & 4 W. 4, c. 42, s. 28, first authorises juries to allow interest upon debts secured by written instruments from the time of such debts being payable, from which it is clear that unless those written instruments had contained stipulations for the payment of interest, it would not have been allowed before that statute. In *Creuze v. Hunter (k)*, interest was refused from the confirmation of the report upon demands liquidated by it, but not bearing interest in their nature, as legacies and arrears of annuities, though both were charged upon land, and the annuities were not paid out of the rents and profits, as possession had been taken by the mortgagees, and though also one of the annuities was the provision for a widow. It was there expressly declared, that simple contract debts did not bear interest. That case was much stronger than the present. The proper rule of the Court of Chancery is, that though there may be interest on a debt payable at a time certain, yet when it is doubtful, interest will not be given, and, above all,

(k) 2 Ves. jun. 157; 4 Bro. C. C. 165. 316.

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will not be given upon rent. But at all events, only simple interest will be allowed where the security for the debt is, as in this case, in the nature of a real security, *exparte Bevan* (l). The decree introduces the term "after the rate of five per cent. per annum, and according to the agreement of 1806." That cannot, however, mean compound interest unless the agreement of 1806 expressly gives it, which it does not. It is indeed doubtful whether interest could be given at all, for the money to be taken by Page in extinguishment of his debt was not merely rent, but was to be taken by him *qua* rent. But even if the interest was intended to be secured by the agreement in the manner now stated, such agreement would not be lawful. The interest would be usurious; it would be five per cent. on the principal, and then five per cent. on the interest of that principal. There is no case to show that the purchaser of an annuity is entitled to interest on the unpaid annuity. *Cotton v. West*, and *Booth v. Leycester* (m), are cases which have very recently occurred in Chancery, and interest was in both cases refused, under circumstances similar to those existing in the present appeal.

Mr. *Pemberton*, in reply :—In this case the striking of half yearly balances is the same as having half yearly rests. Now it is positively stipulated that the balances shall be struck in that manner. The reason for not allowing interest as a general rule on simple contract debts is, that if allowed, all the advantage would be on one side, but where there are, as there are in this case, mutual accounts, that reason does not exist, and interest becomes due as of course, and

(l) 9 Ves. 223.

(m) 1 Keen, 247.

the interest on the balance being struck, becomes at once converted into principal. *Ex parte Bevan* was known to Lord Chancellor Brougham when he decided this case, and the answer to it is, that it is not applicable here.

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The *Lord Chancellor* : — This case, my Lords, also arises upon an order made at the Rolls which was the subject of appeal to the Lord Chancellor. The plaintiff in the Court below felt himself aggrieved by the order of July 1833.—[His Lordship read the order.]—The exception to which that refers was taken by several parties, amongst others by Rebecca and Herbert Broom ; namely, that in taking the account the Master had computed interest and compound interest, when he ought only to have allowed simple interest. The contract provided, as far as Broom was concerned, that certain rents should be paid to Page, out of which he was to be reimbursed what he had expended in building the premises. This provision was contained in that agreement.—[His Lordship here read that part of the agreement of the 27th June 1806, by which it was agreed between Page and Willows, that Page should keep regular accounts, that half-yearly balances should be struck, and that when the value of the new buildings, &c. should be ascertained, the principal sum due, with five per cent. interest thereon, should be allowed to the Appellant, and the amount of all subsequent valuations after the rate aforesaid, from the times of making the same, out of the sum of 1,000 *l.* and the yearly rents of 250 *l.* and 200 *l.*]

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The result of the agreement was, that as Page was to receive the materials, he should from time to time keep an account and make up half-yearly balances. Willows contemplated that Page would from time to time

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receive sums of money on account of his expenditure on the building, and that the money would bear interest, and that the rents which Page received would go in diminution of the interest. It was therefore for the advantage of Willows to provide that Page should keep half-yearly accounts. It does happen, that though this contract was made in 1806, we are now, in 1837, considering the mode in which he should be repaid for his advances. That however does not affect the contract. The amount of remuneration is not in dispute; the sums he expended are not in dispute, but it is contended that these sums from year to year were carried to the account, and as they were not received, and as interest is claimed on one side it should be payable on the other; that he ought to be in the same situation as if the money had been paid. There was an order that the Master should take an account of what was due from Miss Linwood, and it was directed that this Appellant ought to be considered to have a charge on the premises in order to supply the deficiency of payments which that account might show.

That raises another question on this appeal. It appears that before the buildings were completed, accounts were from time to time kept by Page, and interest was carried upon sums of money due to him on the face of the accounts. The decree speaks of the acknowledgment of Thomas Willows; that was made in the last of the certificates given on the making up of these accounts. It was argued at the bar that this mode of dealing between the parties amounted to a contract, that subsequent to the building being completed, the accounts of money due should carry interest throughout in the same way as Willows had allowed them to do at an anterior period. That, however, is not the meaning of the acknowledgment. It

was meant only as an acknowledgment of what was then due. It is true that that was composed in a considerable part of compound interest, but the question now is, what ought to be the construction of the agreement, and your Lordships will find that the decree directs that accounts shall be taken. You are then referred to the agreement itself, which I think merely ascertains the sum which is due.

The Master in his report calculated interest with rests. Exception was taken to the report on the ground that the Master had calculated compound interest. This exception came before the Master of the Rolls on the 17th July 1833, and he overruled it, and confirmed the mode in which the Master had taken the account. The case afterwards came on for further directions, and the mode of taking the account was then again sustained. That mode of taking the accounts, however, formed no part of the original order of the Master of the Rolls. Whether this was what fell from him in making his order, we do not know, but it is not part of the order itself. When the case afterwards came before Lord Chancellor Brougham on appeal, he reversed the decision of the Master of the Rolls, and, on the 17th November 1834, made an order dismissing with costs the Appellant's application to have the accounts taken with rests. The present appeal was then brought upon that decision. Two questions arise on this appeal, first, whether compound interest ought to be allowed, and, secondly, whether interest ought to be given on the two rents of 250*l.* and 200*l.* a year. The decree of 1827 directed an account of the rents, but said nothing of interest. That question is raised for the first time in the exception, and it appears to me that Mr. Page has not succeeded in either of his

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objects. He thought the rents would be paid; he has failed in getting them, partly from the difficulty of the case, and partly from the indigence of some of those to whom he was opposed. But your Lordships cannot, on account of the circumstances of the case, change the contract between the parties; and though he has sustained an injury, yet it appears to me that you cannot do what he asks to remedy it. I see nothing in the contract between these parties to justify the giving of compound interest on the money due. Your Lordships have nothing to do but to carry into effect the contract, which is in writing, and by which they have agreed to be bound. The hardship upon Mr. Page you cannot redress. The grievance is one which arises from circumstances, and he must be content to bear it. I shall therefore move that the judgment of the Court below be affirmed.

Lord *Brougham* expressed his entire concurrence with the opinion of the Lord Chancellor in both these cases.

Judgment affirmed.

Sir *W. Horne*, in the case of *Page v. Linwood*, applied for some direction as to costs.

The *Lord Chancellor* :—We shall say nothing as to costs.

No application of a similar kind was made in the case of *Page v. Broom*.

WRIT OF ERROR

FROM THE EXCHEQUER CHAMBER IN IRELAND.

May 24 & 25,
1835.July 6, and
August 1,
1836.

The Right Rev. NATHANIEL Lord
Bishop of MEATH, and the Rev. } *Plaintiffs in Error.*
JAMES ALEXANDER, Clerk - - }

The Most Noble CHARLES, Mar- } *Defendant in Error.*
quis of WINCHESTER - - - }

In quare impedit against the Bishop of M. to recover the presentation to the church of K., the advowson whereof was claimed to be part of the temporalities of the bishopric, a case purporting to be a case stated for the opinion of counsel on the part of A., a former Bishop of M., touching the right of presentation to that church, and found in the family mansion of A.'s descendants, was offered and received in evidence: **HELD**, that it was admissible as against his successor in the same see.

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HELD also, that a deed relating to the same church, and brought from the same custody, was admissible in evidence against the same party.

A grant, by letters patent of King Edward 4, dated at Drogheda, in the ninth year of his reign, to W., Bishop of M., and his successors, of the advowson of the rectory of K., was also given in evidence. An Act of Parliament was passed at Drogheda, 10 Henry 7, by which, after reciting that "intolerable oppressions and extortions over the poor innocent and true subjects within the poor land of Ireland, which could not be reformed without great costs, and as great part of the King's revenues of the said land had been diminished and granted to divers persons who did little service for the commonweal," *it was enacted* "that there be resumed unto the King's hands all manors, lordships, castles, garrisons, fortresses, advowsons of churches, &c., whereof our said Sovereign Lord, or any of his noble progenitors, Kings of England, was at any time seised in fee-

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simple or fee-tail, from the last day of the reign of King Edward 2,—and all feoffments, gifts in tail, grants, &c., of all and every the aforesaid honors, manors, &c., as before specified, as well by Parliament as by any letters patent under the Great Seal of *England* or *Ireland*, made to any person or persons by whatsoever name or names they be named, from the said day be resumed, revoked, annulled, and deemed void and of none effect in law.”

HELD, that the said Act avoided the grant, and re-appended the advowson to the manor of R., whereto it was appendant before the grant.

A plaintiff in *quare impedit*, after tracing his title through various steps, and averring the death of W., who had been shown to be a joint tenant with plaintiff of a term of years in an advowson, alleged, “Whereupon and whereby the plaintiff became and still is possessed of the said advowson as of an advowson in gross for the remainder of the said term so theretofore granted.” The defendant pleaded that he, as Bishop of M., was seised of the advowson in gross, in right of his see, without this, that the plaintiff was possessed of the advowson in manner and form as the plaintiff had alleged. HELD, that a fine of the advowson in question, levied in 1 Jac. 2, by one whose estate the plaintiff had, was not admissible in evidence under this or any similar issue.

HELD that, if admitted, it ought not to be left to the jury to say whether it barred the action of *quare impedit*.

And HELD that it did not bar the action.

THE benefice of *Killucan*, otherwise *Rathweir*, in the diocese of *Meath*, and county of *Westmeath*, in *Ireland*, having become vacant in February 1828, by the death of the Rev. *Henry Wynne*, the late incumbent, the Marquis of *Winchester* claiming the advowson thereof, as trustee for the Marquis of *Claricarde*, presented his clerk, the *Rev. Cecil Crampton*, to the Bishop of *Meath*, as a fit person to be admitted to the same. The Bishop refused to admit him,

and collated his own son, the Rev. James Alexander, to the vacant benefice. The Marquis of Winchester thereupon brought an action of *quare impedit* against the Bishop and the Rev. James Alexander, in the Court of Common Pleas in Ireland. The declaration contained six counts, but the plaintiff entered a *nolle prosequi* to the first and second, and the jury was discharged on the third, fourth, and sixth counts, so that the questions in the cause arose only on the fifth count, and the pleadings and evidence relating to it.

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The fifth count began by setting out from the year 1544 to the year 1626 the pedigree of the Earls of *Clanricarde* (which the defendants admitted). It then alleged that *Rickard*, fourth Earl of *Clanricarde*, was in 1626 seised in fee of the manor of *Rathweir*, to which the advowson of the church of *Killucan*, otherwise *Rathweir*, was then appendant; that the church became vacant, and that *Rickard*, the fourth earl, presented one *Edward Donnellan*, his clerk, who was admitted, instituted, and inducted; that in 1635, *Rickard*, the fourth earl, died seised, leaving *Ulick de Burgh*, his only issue male, who became fifth earl, and to whom the manor, to which the advowson of the church was appendant, descended as heir at law; that in 1641, the Irish rebellion broke out against King *Charles* the First; that in 1652, the manor to which the advowson was appendant was, on account of the rebellion, sequestered to the use of King *Charles* the Second; that in 1657, the manor continuing sequestered, *Ulick*, the fifth earl (called Marquis *Clanricarde*), died without issue male, leaving *Rickard* his heir at law (whose descent was set out in the declaration and admitted by the defendants), who became sixth earl; that by letters patent under the Great Seal of England, bearing date the 8th of April, 14 *Car.* 2, that

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king granted to *Rickard*, sixth earl (*inter alia*) the manor of *Rathweir*, with the advowson which was then appendant thereto, to the use of *Rickard*, sixth earl, in tail male, with remainders over; that the *Irish Act* of Parliament 14th & 15th *Car.* 2, confirmed the letters patent, saving the rights of persons claiming paramount the crown; that in 1666, *Rickard*, sixth earl, died without issue male, leaving *William* his brother him surviving, who became seventh earl, and being entitled under the uses limited by the letters patent, became seised of the manor to which the advowson was appendant in tail male, with remainders over; that in 1670, *William*, seventh earl, by lease and re-lease with warranty conveyed the manor (excepting the advowson) to Sir *Patrick Mulledy* in fee; that *William*, seventh earl, then became seised in tail of the advowson in gross, with remainders over; that in 1687, *William*, seventh earl, died so seised, leaving his eldest son *Rickard*, who became eighth earl, and was seised in tail of the advowson; that by the *Irish Act* 2 *Anne*, c. 26, advowsons held by persons professing the Roman Catholic religion were vested in the Crown, according to the estate of the patron till abjuration; that in 1708, *Rickard*, eighth earl, died seised without issue, leaving his brother *John*, ninth earl, who being entitled in tail under the uses limited, but professing the Roman Catholic religion, the advowson vested, under the said Act, in Queen *Anne*, and afterwards in King *George* the First; that in 1722, *John*, ninth earl, died, leaving his son *Michael*, tenth earl, who abjuring and conforming to the Protestant religion, the estate of the Crown in the advowson determined, and *Michael*, tenth earl, became seised in tail; that in 1726, *Michael*, tenth earl, died seised, leaving *John Smith*, his son, eleventh earl, to whom

the advowson descended, and who became seised in tail; that in 1745, *John Smith*, eleventh earl, granted the advowson to *Eaton Stannard* and *Robert French* and their heirs, to the use of *John Smith*, eleventh earl, for life, with remainders over; that by an *English Act of Parliament*, 10 Geo. 3, the advowson was vested in Sir *Francis Vincent* and *William Talbot*, in fee, discharged of the uses of the deed of 1745, to the use of *John Smith*, eleventh earl, for life, remainder to his eldest son, Lord *Dunkellyn* for life, with remainders over, and with a power to Lord *Dunkellyn* to create a term for securing a jointure; that thereupon in 1770, *John Smith*, eleventh earl, became seised of the advowson for life, with remainders over; that in 1782, *John Smith*, eleventh earl, died seised for life, leaving *Henry Lord Dunkellyn* his eldest son him surviving, who became twelfth earl, and seised for life of the advowson, with remainders over; that in 1785, *Henry*, twelfth earl, by an indenture of settlement, made in contemplation of his marriage with *Urania Anne Pawlett*, in exercise of the power given to him by the said Act of 10 Geo. 3, demised the advowson to *Henry Penruddock Wyndham* and the plaintiff, then *Charles Ingolsby Pawlett*, for a term of five hundred years, to commence from the death of himself, the said *Henry*, twelfth earl, for securing a jointure to the said *Urania Anne*, his intended wife; that *Henry*, twelfth earl, married, and in 1797, died, leaving his said wife him surviving and still living; that thereby *Henry Penruddock Wyndham* and the plaintiff became possessed of the advowson in gross for the said term; that in 1810, *Henry Penruddock Wyndham* died, leaving the plaintiff him surviving, whereupon and whereby the plaintiff became and continued and still is possessed of the advowson for the residue of the

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term; that in 1828, by the death of the Rev. *Henry Wynne*, the late incumbent, the church became vacant, and that it then belonged to the plaintiff to present, and the defendants disturbed him therein.

To this count the Bishop pleaded thirteen pleas, the Clerk, eight. The sixth, seventh, eighth, ninth, tenth, and eleventh pleas of the Bishop, and the sixth plea of the Clerk, are not material to the questions raised on the record.

The Bishop's first plea, alleging by way of inducement, that he was seised of the advowson in gross in right of his see, concluded with a special traverse of the appendancy of the advowson to the manor of *Rathweir*. His second plea, after the same inducement, specially traversed, that *Rickard*, fourth Earl of Clanricarde, was seised of the manor with the advowson appendant. His third plea, after alleging by way of inducement, that he was seised of the advowson in gross, in right of his see, and that *Anthony*, one of his predecessors, collated *Edward Donnellan*, concluded with a traverse, that *Edward Donnellan* was admitted and instituted on the presentation of *Rickard*, fourth earl. The Bishop's fourth plea, after the like inducement as to the first plea, traversed, that the manor with the advowson appendant was seized and sequestered to the use of *Charles* the Second. His fifth plea, after the like inducement, traversed, that *Charles* the Second, granted to *Rickard*, sixth Earl of Clanricarde, the manor with the advowson appendant. His twelfth plea, after the like inducement, traversed, that the plaintiff was possessed of the advowson in manner and form as the plaintiff alleged; and his thirteenth plea after pleading, by way of inducement, a grant, by King *Edward* the Fourth, of the advowson in gross to the See of *Meath*, and that *Anthony*, Bishop of

Meath, collated the Rev. *Edward Donnellan*, concluded with a special traverse, that *Edward Donnellan* was admitted and instituted on the presentation of *Richard*, fourth Earl of Clanricarde.

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The Clerk's first plea alleging, by way of inducement, that he was parson canonically imparsonate on the collation of the other defendant, Bishop of *Meath*, and that the Bishop and his predecessors were seised in fee of the advowson in gross, in right of the bishopric; that the church became vacant, and that he, the Clerk, was collated by the Bishop; concluded, like the Bishop's first plea, with a special traverse of the appendancy of the advowson. The Clerk's second, third, and fourth pleas, after inducements, the same as that in his first plea, severally concluded with the same special traverse as the Bishop's second, third, and fourth pleas respectively. His fifth plea, after the same inducement as in the first plea, concluded with a special traverse that Earl *Michael* was seised. His seventh plea, after the same inducement as in the first plea, concluded with a special traverse that it then belonged to the plaintiff below to present a fit person to the church; and his eighth plea, after the same inducement, concluded, like the Bishop's twelfth plea, with a special traverse that the plaintiff was possessed of the advowson.

On these pleas by the Bishop and the Clerk, issues were joined, and the cause was tried at bar in the Court of Common Pleas in Ireland before a special jury, on the 15th of November 1830.

At the trial the plaintiff produced in evidence, attested and compared copies of the following documents; *An enrolment* of letters patent, granted by King *Henry 8* to Sir *Wm. D'Arcy*, reciting and confirming a grant by King *Edward 3*, to one *John D'Arcy* and

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Joanna his wife in tail male, of the manor of *Rathweir*, with all advowsons thereto belonging, &c.; *A roll*, containing the enrolment of a writ issued by King *Edward 3*, ordering an extent to be made of the said manor with its appurtenances, and the enrolment of the extent made in pursuance of that writ, &c.; *An Act* of a Parliament held at Drogheda, in the 10th year of King *Henry 7*, which was as follows: "*Item*, prayen the Commons, in consideration of the great and divers robberies, murders, burnings, ravishing of wives and maidens, the universal and damnable extortion as to coign lyve and pay had, used and continued within the poor land of *Ireland*, with many other intolerable oppressions and extortions over the poor innocent and true subjects, the which cannot be reformed and punished without the King's great and royal provision for the repressing of the same, which cannot be done without great costs and charges; and forasmuch as his Noble Grace intendeth, by the grace of Almighty God, to order and reduce the said land to his whole and perfect obeisance, and the great part of his revenues of the said land being administred and granted to divers persons, such as for the most part do full little service for the commonweal, for lack of said revenues the land could not be defended for the destruction of the Irish enemies; therefore it be ordained, enacted and established by authority of this present Parliament, that there be resumed, seized and taken into the King our Sovereign Lord's hands all manors, lordships, castles, garrisons, fortresses, advowsons of churches, free chapels, messuages, lands, tenements, rents, services, moors, meadows, pastures, woods, rivers, waters, mills, dove-cotes, parks, forests, warrens, customs, cocketts, fees, fee-farms and all other manner of profits, hereditaments and commodities

whereof our said Sovereign Lord, or any of his noble progenitors, Kings of England, was at any time seised in fee-simple or fee-tail, from the last day of the reign of King *Edward 2* to this present Act; and by the same authority all manner of feoffments, gifts in tail, grants, leases for term of life, or term of years, releases, confirmations, annuities, fees, pensions, escheats, wrecks, waifs, reversions of all and every of the aforesaid honours, manors, lordships, and of all others, as before it is specified, or of any parcel of them, as well by authority of Parliament as by any letters patent made under the Great Seal of England or Ireland, to any person or persons, by whatsoever name or names they be named, jointly or severally from the said day be resumed, revoked, annulled, and deemed void and of none effect in law; *A parchment* writing, headed *H. R.*, and attached to the said Act, containing a saving to *William D'Arcy* of *Rathweir* and his heirs male of the grant made by King *Edward 3* to *John D'Arcy* and *Joanna* his wife, and their heirs male, of the said manor of *Rathweir*, with its appurtenances, and a saving of all grants to the Archbishop of *Dublin*, the Bailiff of *Dundalk*, and others; *An entry*, in an ancient book remaining of record in the registry-office of the diocese of *Armagh*, of the presentation by Sir *William D'Arcy*, of one *Dermott Martin* to the rectory of the parish church of *Rathweir*, in March 1529, upon a vacancy caused by the death of *Thomas D'Arcy*, the last incumbent; *An Inquisition* taken before the Barons of the Exchequer of *Ireland* in the 23d year of the reign of King *Henry 8*, whereby it was found that King *Edward 4* was seised in fee, the day on which he died, of the manor of *Rathweir*, with all its appurtenances, and had issue *Elizabeth*, *Anne*, *Cecilia*, and *Bridget*; that he died the 9th of April,

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the 23d year of his reign; that the said manor, with all its appurtenances, descended to his said daughters, and that afterwards King *Henry 7*, in the first year of his reign, took to wife *Elizabeth*, one of the said daughters; and in her right he entered into the same manor, with all its appurtenances, and was thereof seised in fee, in right of the said *Elizabeth*; and it was thereby further found that King *Henry 7*, and *Elizabeth*, his Queen, had issue, King *Henry 8*, and that the said *Anne*, *Cecilia*, and *Bridget* died without issue in the lifetime of the said *Elizabeth*, who died on the 18th of February, in the 18th year of the reign of *Henry 7*; that King *Henry 7* continued in possession of the said manor, with all its appurtenances, during his life, and died so seised on the 21st of April, in the 24th year of his reign, after whose death the said manor, with all its appurtenances, descended to the said King *Henry 8*, as son and heir of the said *Elizabeth*, his mother; that one *William D'Arcy*, knight, upon the possession of King *Henry 8*, in the manor aforesaid, with all its appurtenances, entered and intruded on the 1st of January, in the first year of the reign of King *Henry 8*, and the rents and profits thereof took and levied in contempt of said King *Henry 8*; *An enrolment* of a presentation by King *Henry 8*, of one *William Cocks*, dated 18th of August, 24 *Henry 8*, to the said church of *Rathweir*, being then vacant, and to the donation of the said King belonging; *Letters patent* of King *Henry 8*, dated 16th of August, in the 26th year of his reign, granting the said manor of *Rathweir*, with its appurtenances, together with the advowsons of churches, to one *John D'Arcy* and his assigns for life; *Letters patent* of King *Philip* and Queen *Mary*, dated 29th of October, 4 & 5 *Philip* and *Mary*, granting to *Gerald*, Earl of *Kildare*, and

Mabilla his wife, and their heirs male, the Crown's reversion, after the death of the said *John D'Arcy*, of the said manor, with its appurtenances, and all advowsons of churches thereto belonging; *Letters patent* of King *James 1*, dated 30th of October, in the first year of his reign, reciting the last-mentioned letters patent and the death of the said Earl of *Kildare* without issue, and granting to one *John King*, his heirs and assigns for ever, all his reversion in the said manor of *Rathweir*, with its appurtenances, and all advowsons of churches, as fully as the said King *James* or any of his progenitors enjoyed the same; *A fine* levied by the said *John King* and *Catherine* his wife, in the 4th year of the reign of King *James 1*, to *Rickard Burke*, fourth Earl of *Clanricarde*, of the said manor of *Rathweir*, with all advowsons, rectories, or rights of patronage and other appurtenances to the said manor belonging; *An enrolment* of a King's letter, dated 8th of April, 6th *James 1*, directing the acceptance from *Rickard*, fourth Earl of *Clanricarde*, of a surrender of all his manors and spiritual hereditaments in Ireland, and that a new grant thereof should be made to him, and that a commission should issue to inquire as to the same; *An inquisition* taken the 4th of May 1609, in pursuance of the said commission, finding that the said *Rickard* Earl of *Clanricarde*, was seised in fee of the said manor with its appurtenances, acquired by purchase from *John King*, the 1st of January 1606, and all advowsons of churches and vicarages belonging to the same; *Letters patent* dated 19th of July, 8th *James 1*, granting and confirming to said *Rickard*, fourth Earl of *Clanricarde*, his heirs and assigns for ever, the said manor of *Rathweir*, with all its rights, members and appurtenances, &c.; *A commission* for

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holding a royal visitation at Dublin, 22d June, 15 James 1, appointing commissioners to inquire as to church livings, and an entry in the royal visitation book for the year 1615, finding the value of the rectory and vicarage of *Rathweir*, otherwise *Killucan*, and that the Earl of *Clanricarde* was patron thereof; *An entry* in the royal visitation book of the year 1637, showing that *Edward Donnellan* was then rector and vicar of the said rectory and vicarage; *A commission* of the commonwealth, dated 19th of August 1653, directing an inquiry as to all manors, rectories, and other hereditaments, and who owned or claimed the same on the 23d of October 1641, and the return thereto, dated November 7, 1653, finding that the parsonage and vicarage of *Killucan* was on that day (23d October 1641) held by *Edward Donnellan*, clerk, on the presentation of the Earl of *Clanricarde*, patron thereof; *A king's letter*, dated the 16th of July 1661, 13 Charles 2, ordering that *Rickard*, sixth Earl of *Clanricarde*, should be established in quiet possession of all hereditaments which should have come to him by descent; *Letters patent*, dated the 19th of December, 33 Charles 2, reciting the conformity of *Rickard Lord Dunkellyn*, eldest son of *William*, the seventh Earl of *Clanricarde*, to the protestant religion, and granting to the said Lord *Dunkellyn* and his heirs, continuing protestants, all such advowsons and rights of patronage as had belonged to *Ulick*, Marquis and Earl of *Clanricarde*, *Rickard* late Earl and *William* then Earl of *Clanricarde*, or any person claiming under them, either in gross or appendant; *An entry* in the visitation book of the diocese of *Meath*, whereby it appeared that in the year 1673, one *William Barry* was rector and vicar of the church of *Rathweir*; *An enrolment* of letters patent, dated the 20th of January, 7 *William* 3, pre-

senting one *Richard Reader* to the said rectory and vicarage on the death of the said *William Barry*, and of the surrender of said letters patent to the use of the king on the 9th of July 1700; *An entry* on the journals of the House of Lords in Ireland, as to proceedings touching the arrest of one *John Garston*, an attorney, on the complaint of *Anthony Dopping*, then Bishop of *Meath*, of a breach of privilege in suing out two writs of *quare impedit* against him; *A copy* of proceedings in *quare impedit* brought by the Attorney-general in behalf of King *William 3*, against the said *Anthony*, Bishop of *Meath*, and *Anthony Dopping*, clerk, his son, for recovery of the said rectory and vicarage; *An enrolment* of letters patent, dated the 13th of January, 15 George 2, reciting that the said rectory and vicarage was vacant and at the disposal of the Crown, by the promotion of *Anthony Dopping*, clerk, to the bishopric of *Ossory*, and presenting one *Peter Warburton* to the same.

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The Plaintiff below, in addition to other Acts of Parliament and deeds mentioned in his declaration, also produced in evidence the following private documents: *a deed* of conveyance, dated the 4th of March 1699, by *Richard*, then Earl of *Clanricarde*, to one *John Morgan*, of all advowsons that were or had been in the gift of the said Earl or his ancestors, for the next turn only; *an indenture*, dated the 23d of March 1744, whereby, after reciting a former indenture, *John Morgan*, son of the aforesaid John Morgan, conveyed to *John Smith*, Earl of *Clanricarde*, and his heirs, the advowson of the church of *Rathweir* and *Killucan*, and all advowsons appendant to the manor of *Rathweir*, which had been conveyed by the recited indenture to *John Morgan*, the elder; *a private Act* of Parliament, 10 George 3, vesting the estates of *John Smith*, Earl

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of *Clanricarde*, in trustees, discharged of certain trusts, and vesting in *Henry*, then Lord Dunkellyn, eldest son of the said *John Smith*, Earl of Clanricarde, a power to charge upon certain estates and advowsons therein mentioned (including the advowson of Killucan), a jointure of 2,000 *l.* for any wife he might marry, and to create a term of five hundred years in the said estates for securing the same; and a memorial of an indenture of settlement, made the 16th of March 1785, on the marriage of the said Lord Dunkellyn with *Urania Pawlett*, whereby a jointure of 2000 *l.* was charged on the said estates and advowsons, and a term of five hundred years was created and vested in *H. P. Wyndham*, since deceased, and the plaintiff, upon trust, to secure the said jointure.

The Plaintiff further, in support of his case, produced in evidence two documents, the admissibility of which is one of the questions in this appeal; one of these was a parchment writing bearing date the 28th of March 1637, and purporting to be a grant by *Ulick*, fifth Earl of Clanricarde, to *Dr. Edward Donnellan*, of the then next avoidance of the rectory and vicarage of *Rathweir* otherwise *Killucan*. The other purported to be a case, stated for the opinion of counsel on the part of the said *Anthony Dopping*, Bishop of *Meath*, the 28th of February 1695, wherein it was (among other things) stated, on the part of the said Bishop, that in the year 1637, *Ulick*, Earl of Clanricarde, granted to *Dr. Donnellan*, incumbent of *Rathweir*, his executors and administrators, the next presentation to the rectory and vicarage of *Rathweir*, dated the 28th of March 1637; that in 1642 both rectory and vicarage being void by the death of *Dr. Donnellan*, his widow and executrix presented, *pro hac vice tantum*, William Barry to both, who was in-

stituted by the Bishop, June the 13th, 1642, but not inducted till the 27th of February 1660, and that, by a mandate from the Bishop's successor, the Bishop who had instituted being dead before *William Barry's* induction.

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The following witnesses were examined for the plaintiff as to the finding of these two documents. *Mr. Anthony Dopping* deposed, that he was a descendant of *Anthony Dopping*, formerly Bishop of *Meath*, and that he had in his possession several papers, which were handed to him as coming from *Lowton House*, where the *Dopping* family papers were kept; that *Lowton House* is the family mansion of the *Doppings*; that the papers in his possession were handed to him by *Mr. John Darcy*, who is a relation of the *Dopping* family; that the two documents now produced by him were handed to him among the said papers by the said *John Darcy*, at a *Major Sirr's*, and that he never saw the said two documents or any of them at *Lowton House*. *Mr. John Darcy* deposed, that he handed a parcel of papers to *Mr. Anthony Dopping*, the last witness; that he got the said parcel of papers from *Sir William Betham*, and that there was a paper round them. *Sir William Betham* deposed, that he found a parcel of papers at *Lowton House* among other papers, and that the *Rev. Mr. Sirr* (son of *Major Sirr*) was with him; that he found said parcel of papers in a room with other papers, and that he handed the said parcel of papers to the said *Mr. Sirr*, on or about the 28th of October 1828; that *Lowton House* belonged to or is inhabited by a *Mrs. Dopping*, a middle aged lady; that he put no mark on the said parcel of papers, but that he took copies of them; that at the time of finding the said parcel of papers he found several visitation books of the diocese of *Meath*,

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particularly one of the year 1616, by *George*, Bishop of *Meath*; that there were in the same room several other papers relating to the See of *Meath*, several of which were in the same parcel which he brought away; and that the said two documents produced by the said *Anthony Dopping* above mentioned, were in the said parcel of papers; that he was at *Lowton House* from two o'clock on Monday to two o'clock on the following day; that he went there on the part of the said Mr. *Sirr* and Mr. *John Darcy*, and that he never informed the said Bishop of *Meath* (one of the defendants below), that the said papers or books, or any of them, were at *Lowton House*, but that he showed copies of some of them to the plaintiff's agent, and told him the said papers were at *Lowton House*. The Rev. *George Brabazon* deposed, that he is registrar in the registry office of the Diocese of *Meath*, at *Navan*, and that there is no registry of ecclesiastical or other records, (except one roll), anterior to the year 1717; that the said registry office is the proper place where the visitation books of the diocese and entry of all presentations, admissions, institutions and collations to ecclesiastical benefices within said diocese, and various other papers and records relative to the said diocese, and the several ecclesiastical benefices within the same, should be kept, but that such are not to be found and are not preserved in the said registry office, relating to a period anterior to 1717, the reason of which circumstance he was unable to explain.

The counsel for the defendants at the trial, did not cross-examine those witnesses, but objected to the reception of these two documents in evidence; but the learned Judges overruled, the objection, declaring their opinions, that they were admissible, to which holding the defendants' counsel tendered a bill of exceptions.

The evidence produced on behalf of the defendants at the trial, consisted of (among other documents) an attested copy of a King's letter, dated the 8th July 1354 (28 King Edward 3), and letters patent, dated the 9th of March, 2 King Henry 5, from both which, and the recitals contained in them, it appeared that after the conquest of Ireland, King *Henry 2* granted the land of Meath to *Hugh de Lacy*, in fee; that by the forfeiture of the *De Lacys*, the manor of *Rathweir*, with the said advowson, vested in the Crown, and was granted, among other property, by King *Edward 2*, to *Roger Mortimer* Earl of *March*, who, on his attainder, forfeited it to King *Edward 3*; that the attainder was reversed and the manor and advowson, &c. re-vested in *Roger Mortimer*, the grandson of the attainted Earl. From an Act of Parliament, 11 Elizabeth, s. 3, c. 1, it appeared that *Roger Mortimer*, son and heir of the last mentioned *Roger*, had issue *Edmond Mortimer*, *Ann* and *Ellinor*; that *Edmond* and *Ellinor* died without issue, and *Ann* was married to *Richard*, Earl of *Cambridge* (son of *Edmond Langley*, Duke of *York*, fifth son of *Edward 3*), and that they had issue, *Richard Plantagenet* Duke of *York*, father of King *Edward 4*, to whom the said manor and advowson descended in right of his grandmother. From the inquisition dated 23 King *Henry 8*, (the same that was put in evidence by the plaintiff), it appeared that the manor of *Rathweir* descended on *Elizabeth*, the last surviving daughter of King *Edward 4*, and wife of King *Henry 7*, from whom it descended to King *Henry 8*. But with respect to the advowson, the defendants contended that King *Edward 4*, disappended it from the manor, and they relied upon a grant made by him of the said advowson to *William Sherwood*, Bishop of *Meath*, and his

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successors, as appeared by letters patent, dated at *Drogheda* the 5th of January, 9 King *Edward* 4, and to this effect: "To all to whom, &c., Know ye that we of our special grace, with the assent of our dear cousin *John* Earl of *Wigram*, deputy of our very dear brother *George*, Duke of *Clarence*, &c., have given and granted to the venerable father in Christ, *William* Bishop of *Meath*, advowson as well of the rectory as of the vicarage of the parish church of *Rathweir*, in the county of *Meath*, to have and to hold the advowson of the rectory and vicarage of the church aforesaid to the aforesaid bishop and his successors for ever, any statute, act, &c., to the contrary, &c., notwithstanding, &c. Witness the aforesaid Deputy at *Drogheda*, the 9th of January, in the ninth year of our reign: *Eustace*."

The Rev. George Brabazon, who had been examined on behalf of the plaintiff, was also examined for the defendants as to an ancient parchment roll produced by him, and purporting to be a proxy-roll of the diocese of *Meath*, and to be written in the year 1518, and he deposed, that he found the same among the records of the registry of the diocese of *Meath*, of which he was registrar, and that he believed the letters "*Ep. con.*" in the margin of the said roll, and opposite (among others) the parish of *Rathweir*, to mean "*Episcopus confert*," and that all the benefices in the said roll, with such letters opposite to them, are in the gift of the Bishop of *Meath*, except one or two not now at his disposal, but which were so formerly.

The defendants next produced two visitation-books of the diocese of *Armagh*, one for the year 1664, containing an entry of a visitation on the 29th of June 1664, at which *William Barry* exhibited a collation to the said church of *Rathweir*, or *Killucann*, granted

by *Anthony*, Bishop of *Meath*, the 13th of January 1642; the second, for the year 1745, containing an entry, signed by the rector and churchwardens, stating that the rectory of *Killucan* was collative, and that *Peter Warburton* was then rector; also an entry of the Rev. *Anthony Dopping's* collation, by *Anthony*, Bishop of *Meath*, and of the Rev. *Henry Wynne's* collation, by *Henry*, Bishop of *Meath*. The last document offered in evidence by the defendants (and the admissibility of which is another question in this writ of error) was an attested copy of a fine *sur con. de droit*, &c. of Trinity term, 1 James 2, levied by *William*, Earl of *Clanricarde*, and *Hester*, his wife, to *John Brown*, *Gerald Dillon*, and *Anthony Mulledy*, Esqrs., and the heirs of *John Brown*, of the advowson of the said church of *Killucan* (among other things), in consideration of 6,200*l.*, with a warranty by the said earl and his wife.

The counsel for the plaintiff objected to the reception of the fine in evidence, but the learned Judges were of opinion that it was admissible, and it was accordingly admitted, whereupon the counsel for the plaintiff excepted to that opinion of the Judges.

The case having closed on both sides, the learned Judges proceeded to charge the jury.

The counsel for the defendants, relying on the grant of the advowson by *Edward 4* to *William Sherwood*, Bishop of *Meath*, and his successors, put in evidence by the defendants, insisted that the Judges should tell the jury that, if they believed *Edward 4* made that grant, and that he was seised of the manor with the advowson appendant at the time of making it, in such case the grant was valid, and had rendered the advowson disappendant and thenceforth in gross, and that it never did again become appendant and did not pass to *John King* by the said letters patent of 1 *James 1*,

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but the Judges refused so to direct the jury; on the contrary, they directed them that although they should believe that *Edward 4* was so seised and made such grant, yet their opinion was, that the advowson had again become appendant by force of the Act of 10 *Henry 7*, put in evidence by the plaintiff, and therefore did pass to *John King*.

The same counsel further insisted, that the Judges should direct the jury, that if they believed *Edward 4* was seised of the said manor with the advowson appendant, and being so seised made the grant to *William Sherwood*, Bishop of *Meath*, the grant was not avoided by the Act of 10 *Henry 7*, but the Judges refused so to direct the jury; on the contrary, they directed them that the said Act avoided all grants from the death of *Edward 2*, and therefore that the said grant to *William Sherwood* was avoided.

The same counsel also insisted that the Judges should direct the jury, that if they believed *Edward 4* was seised of the said advowson with the manor appendant, as of his private property and not in right of his crown, and that being so seised he made the said grant to *William Sherwood*, that the grant was not avoided by the said Act of 10 *Henry 7*, but the Judges refused so to direct the jury, but told them that, supposing it to be a material question whether *Edward 4* was so seised of the said advowson, there was no evidence that he was seised of it as of his private estate.

The counsel for the defendants likewise insisted that the Judges should direct the jury, that by operation of the fine levied by *William*, seventh Earl, and his wife, to *Brown*, *Dillon*, and *Mulledy*, and admitted in evidence for the defendants, all the estate of the said Earl *William* was conveyed away from him and his

heirs, and he and his heirs and the plaintiff were barred from claiming any estate in the said advowson, and the plaintiff was barred of all right to recover, but the Judges refused so to direct the jury, but told them that the said fine was not a bar to the plaintiff's right to recover.

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The defendants' counsel also insisted that the said fine was sufficient to show that the plaintiff was not possessed of the advowson or of any term therein, and to bar the plaintiff of his action, and prayed the Judges to admit the said fine to be sufficient to entitle the defendants to a verdict, but the Judges declared their opinion that the said fine was not sufficient to bar the plaintiff of his action, or to entitle the defendants to a verdict.

The jury found a verdict for the plaintiff on the several aforesaid issues.

The counsel on both sides excepted to the opinions of the learned Judges at the trial; the counsel for the plaintiff, to the admission of the fine, levied by *Earl William* and his wife, in evidence for the defendants, and the counsel for the defendants, to the admission of the parchment writing and case brought from Lowton House, in evidence for the plaintiff, and also to the above stated opinions and directions of the Judges to the jury. A bill of exceptions, containing the several matters herein before stated, was tendered to and sealed by the Judges.

The Court of Common Pleas in *Ireland*, gave judgment for the plaintiff, which being affirmed on error to the Court of Exchequer Chamber in *Ireland* (a), the defendants below brought their writ of error returnable in Parliament, and assigned for error, in substance, That the parchment writing, purporting to

(a) 1 Alcock & Nap. 508.

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be a grant by *Ulick*, fifth Earl, to *Dr. Edward Donnellan*, of the next avoidance, and the paper writing, purporting to be a case stated in 1695 on behalf of *Anthony*, Bishop of *Meath*, for the opinion of counsel, were improperly admitted in evidence.

That the jury were misdirected as to the operation of the Act 10 Henry 7, on the grant of the advowson by King *Edward 4*, to the see of *Meath*; and also as to the effect of the fine of Trinity term, 1 Jac. 2.

The House of Lords, considering the case to be of such a nature as to require the assistance of the Judges, made an order for their attendance (*b*).

The *Attorney-General* (Sir *William Follett* and Mr. *Byles* were with him) for the plaintiffs in error.

In the Court below, the plaintiffs in error relied on the grant of the advowson of the church of *Kil-lucan* by King *Edward 4* to *William Sherwood*, Bishop of *Meath*, and his successors in that see, whereby the advowson was disappended from the manor of *Rath-weir*. They further relied, in bar of the action, on the fine levied of the advowson to *John Brown* and others, 1 *James 2*, by *William*, seventh Earl of *Clanricarde*, conveying it away from him and his heirs, under whom the defendant in error claimed it. He, on the other hand, insisted that the grant by *Edward 4* was annulled by an alleged Act of Parliament of the tenth year of King *Henry 7*, that by that Act the advowson was resumed into the king's hands and re-appended to the manor, and that the manor and advowson were afterwards granted in fee, by King *James 1*, to

(*b*) The Judges present were Lord Chief Justice Tindal, Justices Park, Gaselee, Littledale, Williams, Patteson, and Coleridge; Barons Parke, Bolland, and Gurney. The Great Seal being in commission, Lord Shaftesbury presided; Lord Lyndhurst and Lord Brougham were present.

one *John King*, who conveyed them for valuable consideration to *Rickard*, fourth Earl of Clanricarde, upon whose seisin of the manor with the advowson appendant, the plaintiff below relied. In deducing his title from that earl, the plaintiff below put in evidence, among other documents, a parchment writing purporting to be a grant, in 1637, from *Ulick*, the fifth earl, of the then next avoidance of the church to Dr. *Edward Donnellan*; and also a paper writing purporting to be a case stated for the opinion of counsel in the year 1695, by *Anthony Dopping*, then Bishop of *Meath*, respecting the patronage of the church, and referring to the said grant.

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The first question for consideration of their Lordships was, whether the grant and case were legally admitted in evidence by the Court below. One objection, which applied to both those documents, was, that they were not properly authenticated, not being shown to have come from the proper custody. They were produced at the trial by Mr. *Anthony Dopping*, who said he was a descendant of *Anthony Dopping*, formerly Bishop of *Meath*. They were handed to him as coming from *Lowton House*, the family mansion of the *Doppings*, where the family papers were kept. He never saw these documents at *Lowton House*; he received them from one *John Darcy*, a relation of the *Doppings*. The account given by *John Darcy* on his examination was, that he received from *Sir William Beetham*, at the house of a Mr. *Sirr*, a parcel of papers, which he gave to Mr. *Anthony Dopping*. Then *Sir William Beetham* said he went to *Lowton House* in October 1828, at the instance of Mr. *Darcy* and Mr. *Sirr*, both partisans of the plaintiff below, and he found the parcel of papers in a room there, and handed them to Mr. *Sirr*; and there were visitation

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books and other papers belonging to the see of *Meath* in that room, several of which, together with these two documents, were in the parcel which he brought away. To give the greater appearance of authenticity to these documents, the plaintiff below produced at the trial the Rev. *Mr. Brabazon*, who said he was registrar of the registry-office of the diocese of *Meath*, and that his office was the proper place for the visitation books, and for the entry of all presentations, admissions, institutions, and collations to ecclesiastical benefices within the same, but no such entry, nor any ecclesiastical or other records except one roll, were to be found in that office, relating to any period anterior to the year 1717. That was all the evidence that was given to authenticate these documents. There was no proof that *Lowton House* was the family mansion of Bishop *Dopping's* descendants; no proof that *Mr. Dopping*, the witness, or *Mrs. Dopping*, the elderly lady who was said to inhabit that mansion, was connected with the bishop of that name; there was no pedigree, and no proof by will or administration of any such connexion. Sir *William Beetham* was instructed, on the part of the friends of the plaintiff below, to make a search; he went to that house in company with *Mr. Sirr*, and brought away and gave the parcel of papers to *Mr. Sirr*, who gave them to *Mr. Darcy*, who gave them to *Mr. Dopping*, by whom these documents were produced at the trial. There would be no protection against fraud in courts of justice, if documents, the custody of which rested on such vague proof as was given by these witnesses, were to be held admissible in evidence.—[Lord *Brougham* : If parties chose not to cross-examine witnesses, but leave the evidence vague and loose for the purpose of taking objections afterwards, it was their own fault, but it is

a practice which is not to be encouraged. Whether *Lowton House* was the family mansion of the descendants of *Bishop Dopping*, and whether the lady who inhabited it and the witness *Dopping* were related to the bishop of that name, might have been cleared up at the trial by cross-examination of the witnesses.]—It was the duty of the plaintiff below to prove his case by the best evidence. For the administration of justice, it was of extreme importance to enforce strictly the rules which the Courts have from time to time established respecting the custody of ancient documents not capable of proof by attesting witnesses or by the handwriting. Admitting *Lowton House* to be the family mansion of *Bishop Dopping's* descendants, and that it was the repository of the family papers, it was not the proper repository of these documents: *Pott v. Durant* (c), *Miller v. Foster* note to *Atkins v. Hutton* (d), *Michell v. Rabbetts*, cited in *Swinerton v. The Marquis of Stafford* (e), *Earl v. Lewis* (f), *Bullen v. Michell* (g), *Randolph v. Gordon* (h).

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The grant should properly be in the registry of the diocese, or with the descendants of *Dr. Donnellan*, the alleged grantee, but not with the bishop or his descendants.—[*Lord Brougham*: A man keeps to himself his title to an advowson, because he presents *toties quoties*, but if it be the next avoidance, the whole grant is spent in the grantee upon the presentation, and he might naturally permit the bishop to retain it; and, indeed, the custody of it might be necessary for the bishop's protection, as the owner of the advowson might send another presentee to the bishop, who would not have the best evidence of the

(c) 3 Anstr. 795.

(d) 2 Anstr. 386.

(e) 3 Taunt. 91.

(f) 4 Esp. 1.

(g) 2 Price, 399.

(h) 5 Price, 312.

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former presentation without the grant. At all events the bishop's family would properly have the custody of the case, if not of the grant. Then if the house in question is to be considered the family house of the bishop and of his descendants, that might be conclusive upon the question of custody, if such case is evidence against the successors.]—[Lord *Lyndhurst*: Though the objection to the grant may be sustained, that would be good for nothing without the case. If the case is rightly in the bishop's custody, that is connected with the grant, for the case refers to the grant. The objection as to custody does not seem to apply to the case.]—Independently of the objection to the custody, the grant purporting to have been made by *Ulick*, fifth Earl of *Clanricarde*, was no evidence of the seisin of *Richard*, fourth earl. A grant of the next avoidance was not, *per se*, any evidence of seisin in any one, and there was no admissible evidence of presentation under this grant.

There was another and a stronger objection, founded on the policy of the law, to the production of the alleged case against the successor of the bishop, by whom the case purported to be stated. The case could not be admitted in evidence against bishop *Dopping*.—[Lord *Brougham*: He would be compelled by order of the Court of Chancery, on a bill of discovery, to produce it. Harsh as the practice may seem, it is so decided in Chancery, and in this House also; *Radcliffe v. Fursman* (i).]—[Lord *Lyndhurst*: And so it is in *Preston v. Carr* (k), in the Court of *Exchequer*.]—The doctrine was laid down in the case of *Bolton v. The Corporation of Liverpool* (l). There the subject of dispute was a matter of public right,

(i) 2 Bro. P. C. 514. Toml. ed.

(k) 1 You. & Jerv. 175.

(l) 3 Sim. 467, and on appeal, 1 Myl. & K. 88.

the tolls of the town, in which the defendants had no private interest. The principle of that case was not applicable to a confidential communication made to a party's legal adviser respecting his private rights. In some cases (*m*) at *nisi prius* Lord *Tenterden* was supposed to limit the privilege to communications in respect of actions actually brought.

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[Lord *Brougham*:—I found it necessary to question these decisions in a case which came before me in the Court of Chancery, and which I decided, after consulting with all the Judges (*n*). The rule at law is quite accordant with the principle applied in courts of equity on bills of discovery, in which the plaintiff has a right to wring the conscience, as the phrase is, of his adversary, and to inquire what he said in conversation with others, even with his attorney, on the subject of the suit. An action brought or suit instituted, or about to be brought or instituted, is an exception. But before litigation commences, although you may ask the party himself, and compel him to disclose what he said or stated in writing, you cannot ask the attorney or counsel to disclose what passed in private conversation with the client on the subject of the suit. The case of *Bolton v. The Corporation of Liverpool*, did not so much turn on its being a case of tolls or matter of public interest, as that it was within the common rule of courts of equity as to discovery. The effect of the decision is, that you have no right to that which touches the title of your adversary only, but that if it is part of your own title, or a title in common, the production of it may be

(*m*) *Wadsworth v. Hamshaw*, 2 Brod. & B. 5 n., and *Williams v. Mundie*, 1 Ry. & Moo. 34.

(*n*) *Greenough v. Gaskell*, 1 Myl. & K. 98.

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compelled. In the present case, there was no question of compulsory production. The document being produced by the plaintiff, the question was, whether it was admissible in evidence against the bishop's successor. The decisions in courts of equity show, that where a case has been laid before counsel, it is the inveterate practice of those courts, acted upon daily, that in any proceeding, except the suit actually pending, the defendant may be compelled, by bill of discovery, to produce the case laid by him confidentially before his counsel, but not the answer of the counsel, a rule apparently not very consistent. The exception of *lis mota* is confined to the suit pending, or in immediate contemplation. The documents ordered to be produced in a court of equity would be evidence in an action at law. Any objection to them as evidence there would be a reason for refusing their production in equity. *Preston v. Carr* was a strong case. *Greenough v. Gaskell*, before me in Chancery, was a bill charging a solicitor with a participation in a fraud, in the course of proceedings on the part of his client, and I refused to compel him to produce entries in his books, and written communications received by him from his client relative to those proceedings. It may be difficult in principle to draw a distinction between what passes in the consultation room with the attorney and counsel upon a verbal consultation, which the client may be compelled to disclose, and the written opinion of the legal adviser upon a case, which is a written consultation. The question upon that point has not been pressed in courts of equity.]

The *Attorney-General* read the judgment in the case of *Greenough v. Gaskell*, and on the doctrines and principles there laid down he submitted that

the case—supposing it to be authenticated—would not be admissible in evidence against Bishop *Dopping*, if he were the defendant in this action, and therefore it was not admissible against his successors in the see of *Meath*. The acts of a bishop, who is a sole corporation, bind his successors, but not his declarations or statements: *The King v. Gwynn* (*o*). The case of *Maddison v. Nuttall* (*p*), on which the Lord Chief Justice *Bushe* relied in delivering the judgment in the Exchequer Chamber in *Ireland* (*q*) did not sustain that judgment. The case purported to be dated in 1695, and it stated the grant, which was dated in 1637, and an institution under it in 1641, of either of which Bishop *Dopping* could not have any actual knowledge, being born, probably, prior to either of those dates. The statement was made in his private character, consulting his legal adviser respecting his private rights.

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[Lord *Lyndhurst*: The statement related to the rights of the bishop as bishop. A declaration made by bishops or other persons, in their corporate characters, is evidence against their successors, although it may relate to facts which occurred before their existence, inasmuch as they might have before them documents and proofs which have since perished. Bishop *Dopping*, in this case, asserts that a particular person was presented to the living: he might have seen the instrument of presentation. If he says that he was in consequence instituted, he might have seen the instrument of institution, or an entry in the book of the former bishop, which might have recited on whose presentation he was instituted, and thus he might have acquired competent knowledge of the

(*o*) 1 Strange, 401.

(*p*) 6 Bingh. 226. 3 M. & P. 544.

(*q*) 1 Alcock & Nap. 506.

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facts, according to the rules of evidence, although the facts happened before his birth. In this case it seems he saw the person instituted in actual possession of the living.]

The *Attorney-general*:—The next question arose on the grant by King Edward 4 to *William Sherwood*, Bishop of *Meath*, and his successors, and on the effect of the alleged Act of 10 Henry 7. It was admitted that the grant was valid, and would enure to the successors of Bishop *Sherwood*, if the Act had not resumed all grants into the hands of *Henry 7*. The Act was set out in the bill of exceptions, but no one knew where it was found. The House would perhaps take cognizance of it, and authenticate it by sending for the roll, and thereby ascertain whether such an Act ever existed; and if it did, whether it was still existing unrepealed. Assuming that the Act was genuine, it could not operate as a resumption of the grant to Bishop *Sherwood*; it applied to grants under the Great Seal, but the grant by *Edward 4* was in his private capacity, and not under the Great Seal; and the thing granted was not part of the possessions of the Crown. But suppose the Act did operate as a resumption of the grant of the advowson, then it could not pass afterwards as an advowson appendant to the manor of *Rathweir* to *John King*, from whom the Earl of *Clarricarde* claimed to derive. The grant had disappended the advowson from the manor, and it could never again become appendant; the appendancy was destroyed, and the advowson, from the time it was granted by itself, became an advowson in gross for ever (1 *Comyn's Digest*, Tit. App. (D), p. 532.) (r). The only exception to the rule there laid down was, when the Act disappending the advowson was unlawful.

(r) 3d ed. by Kidd. See also 2 Mod. 1.

[Lord *Brougham*: By the statute of *Henry 7*, all manner of feoffments, gifts in tail, grants, &c. there enumerated were to be "deemed void, and of none effect in law." Upon a fair construction of these words, it cannot be reasonably argued that the grant of the advowson away from the manor had the effect of a severance for ever, since the statute made the grant utterly void, as if it never existed. With respect to the argument on the use of the words "Great Seal," as applying only to the possessions of the Crown, they do not appear to override the whole clause, the resumption applying first to "all manors, lordships, castles, garrisons, fortresses, advowsons of churches, &c., whereof the kings of *England* were at any time seised in fee simple or fee tail from the last day of the reign of King *Edward 2*;" and then by a distinct clause, "all manner of feoffments, gifts in tail, grants, &c., as well by authority of Parliament as by letters patent made under the Great Seal of England, or Ireland, &c." are declared to be resumed and made void, so that all grants by the former clause independently of, and as well as by the latter, which specified grants under the Great Seal, are declared to be null and void.]

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The *Attorney-general*: It could not be intended by the Resumption Act to appropriate to the Crown what never did belong to it. *Henry 7* did not acknowledge *Edward 4*, or any of the princes of the House of *York*, as his "progenitors."—[Lord *Lyndhurst*: May not "predecessors" be meant?]
The manor belonged to *Edward 4*, as Earl of *March*, its title was derived from the *Mortimers*, Earls of *March*. *Henry 7* was anxious to keep his title, as Duke of *Lancaster*, distinct from that of king, as

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the Appellant, over and above the yearly rent of 250*l.* to be reserved in the underlease to her, the sum of 1,000 *l.* by four half-yearly instalments, commencing the 24th June 1807, without interest. The Appellant agreed to pull down the old buildings, and to render an account of the materials to Willows, and to complete the new works on or before the 25th of December 1806, according to certain plans and specifications therein referred to, and that he would, upon the lease being executed to him, grant to Miss Linwood an underlease of the apartments to be occupied by her for the term of forty-eight years and three-quarters, from the 25th of December, 1806, if the buildings should then be completed, at the rent of 250 *l.* a year, payable half yearly; and it was agreed by Willows that certain rooms should be erected for J. & H. Broom, in lieu of other rooms which had been given up by them for the accommodation of other parties, and Willows agreed with the Appellant, to take from the Appellant a lease of the residue of the new buildings not occupied by Miss Linwood, or reserved for Messrs. Broom, for the same term of forty-eight years and three-quarters, at a rent of 200 *l.* a year, from the 25th March 1807, and payable half yearly; and it was further agreed between the Appellant and Willows, that the Appellant should, after the intended new buildings should be completed and valued, keep regular accounts of all sums received by him under the agreement, and strike a half yearly balance, and produce accounts and vouchers to Willows, his heirs, &c. and that when the amount of the value of the new buildings, and other compensations to be allowed to the Appellant, pursuant to these several articles of agreement should be ascertained, such principal sum, with interest thereon from that

That direction of the Judges was erroneous.—[Lord *Lyndhurst*: Suppose the traverse put in issue all the allegations in the declaration, still it was competent to the defendants below to prove an independent fact in answer to those allegations. The plaintiff's business was to prove the allegations in his declaration. How could the fine be an answer to them unless it was pleaded?—]The fine was properly admitted in evidence; and being a fine levied by a person through whom the plaintiff claimed title, it was a bar to his action. Upon all the points it was submitted, that the judgment of the Court below ought to be reversed, or at least that their Lordships ought to direct a new trial.

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Sir *William Follett* being engaged in one of the Courts, the *Attorney-general* asked if their Lordships would hear Mr. *Byles* instead of him, and give Sir William the reply to the counsel on the other side.

Lord *Brougham*:—That would be to hear three counsel on a side, which is contrary to practice. The duty of counsel in reply is to displace the arguments of his adversaries, which of course Sir William Follett may do, but if he introduces new matter, the counsel on the other side will have leave to reply to it.

Sir *Frederick Pollock* and Mr. *J. B. Miller* (s), for the defendant in error.

The first question was, whether the grant of the next avoidance by *Ulick*, fifth Earl of *Clanricarde*, to Dr. *Donnellan*, and the case prepared on behalf of

(s) Of the Irish bar.

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Bishop *Dopping*, both found in the family mansion of the *Doppings*, were admissible in evidence for the plaintiff below, under the circumstances of their production. The grant would, undoubtedly, be of greater importance if it had been brought from the diocesan registry; but if it is a valid grant, it was not necessary that it should be brought from the *best* custody, it was sufficient if it came out of *proper* custody, in which case ancient deeds prove themselves. The combined result of the testimony of the witnesses relating to the finding of these documents was, that no ecclesiastical records of the see of *Meath* were to be found in the diocesan registry, anterior to the year 1717. If any such documents existed at all, they were to be sought for in some other repository. Absence from the registry was no ground to impeach their validity. Several of those records, of date anterior to 1717, were found in *Lowton House*, which is admitted to be the family residence of the *Dopping* family, the descendants of *Anthony Dopping*, a former Bishop of *Meath*. If the ecclesiastical records of his time were not in the public registry, where some, at least, of those documents, ought to have been deposited, then *Lowton House*, the place in which they were discovered, must, under the circumstances, be regarded as the diocesan registry during the time *Anthony Dopping* was bishop. The documents in question were found in that house, among other records of the see of *Meath*; and the grant of the next avoidance was found with documents in the custody in which it ought to have been. That grant was originally given to the grantee for the purpose of being delivered to the bishop of the diocese, when the avoidance of the church, the occasion for using it, should happen. That document could not pro-

perly remain in possession of the grantee after it was acted upon, but should be in possession of the bishop who admitted the presentee under it, and for whom the grant was a warrant.

It was argued for the plaintiffs in error that the grant, at all events, amounted to no more than a claim of right, and that there was no evidence of enjoyment under it. But there was some evidence—*intrinsic and presumptive evidence at least*—that the grant was acted upon, and that under its authority the presentee of the grantee's widow and executrix was instituted and inducted into the benefice. Why was the grant found among the records of the see of *Meath*? Because it was necessarily produced and delivered to the bishop of that diocese, to show to him why a person, who was a stranger to the patronage of the church, called upon him to institute a nominee into the benefice, and because the bishop retained it as his warrant for so instituting the nominee of a stranger. If he had rejected the presentee, he should have returned the deed of grant. To retain the deed, after having repudiated its authority, would have been a species of fraud on the grantee. The true as well as the natural and reasonable inference was, that the bishop complied with the requisition of the patron of the benefice, and having done so, he retained and deposited, amongst the archives of the see, the instrument which had authorised him so to act. The fact of recognition of the grant by the Bishop of *Meath*, with all its accompanying value, would be fully established by the case, the other document found in the same place and at the same time, if it should be held that the latter was properly received in evidence. In support of the propriety of its reception there were

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many authorities. In *Doe v. Robson* (t) Lord *Ellenborough* said, "The ground on which entries in a deceased attorney's books, showing the time when a lease prepared for a client was executed, had been received, was that there was a total absence of interest in the persons making the entries to pervert the fact, and at the same time a competency in them to know it." So there was a competency in the person stating the facts contained in this case to have known them accurately ; and it was contrary to his interest to state them in the manner that he had done. In *Higham v. Ridgway* (u) the principle was clearly stated by Lord *Ellenborough*, and more fully by Justices *Le Blanc* and *Bayley*, to this effect, that where the Court was satisfied that the person whose written entry was offered in evidence had peculiar means of knowledge, and had no interest in falsifying the fact, but, on the contrary, had an interest against his written entry, that entry was clearly evidence. The same principle of absence of interest to misrepresent, and competency to know the fact, was fully recognised in the case of *Bullen v. Michel* (x), in the Court of Exchequer, where Mr. Baron *Graham*, adverting to the chartulary of the abbey of *Glastonbury*, found in possession of Lord *Bath*, who was owner of some of the possessions of the abbey, although not situated in the parish in which the controversy about moduses arose, said he grounded his opinion that the document was properly admitted in evidence upon this simple rule, that an instrument of this sort, coming from a custody which gives it authenticity as a genuine document, and re-

(t) 15 East. 32, see p. 34.

(u) 10 East, 109, see pp. 119, 120, and 121.

(x) 2 Price, 399, see p. 413.

ting to the subject of inquiry or point in issue, must be read to the jury as bearing upon the question in issue. In *Short v. Lee* (y) Sir Thomas Plumer, M.R., said, "When an inquiry is carried back to such a remote period, the dearth of evidence naturally leads the Court, from its desire of ascertaining the truth, rather to let in than exclude what is offered, taking care always not to exceed the bounds of legal rules. These documents possess those qualifications which always make the declarations of deceased persons evidence, namely, that they were persons having a competent knowledge, or whose duty it was to know, having no motive to make a false representation; and their written declarations being directly at variance with their interests, such declarations are universally evidence." In *Fenwick v. Reid* (z), it was ruled that a letter, appearing on the face of it to be written by the defendant's ancestor upon the subject of the suit, and coming out of the custody of the representative of his attorney, was admissible without proof of the hand-writing, the contents affording intrinsic evidence in its favour. The case of *Maddison v. Nuttall* (a) was conclusive on this point. There a statement respecting payment of tithes by a modus signed by a rector, was held evidence against his successor as an admission by his predecessor, although it was not found in the parish register, but among the title-deeds of a landowner in the parish. In *Isham v. Wallace* (b) a copy of a faculty granted in 1613 was admitted in evidence, it being produced from the custody of a person whose rights were bridged by it, and there being evidence that the

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(y) 2 Jac. & W. 464.
(z) 6 Madd. 7.

(a) 6 Bingh. 226; 3 M. & P. 544.
(b) 4 Sim. 25.

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so doing, and from time to time, according to the agreement, delivered to Thomas Willows, John and Herbert Broom, and Mary Linwood, accounts of the works he had done and of what was due to him in respect thereof, and that such works were upon each occasion duly examined and valued, and that it appeared from the last of those accounts, that there was due to the Appellant on account of such works, on the 25th of March 1809, the sum of 13,290*l.* 1*s.* 6*d.*, and that certificates of that amount had been drawn up and signed by Thomas Willows; and that in the course of such works it became necessary to make alterations and to build upon other parts of the premises beyond the site of that part agreed to be demised to the Appellant, and that all the works were considered as one, and only one account thereof was kept; and that, in the course of such works, Thomas Willows requested him to make other alterations and repairs upon the same premises, and that he had made some of such alterations and repairs, and that he was desirous of having some further security for the money which he should expend, and for what would become due to him in respect of such intended rooms, and that Thomas Willows, in consequence of such request, and in consideration of such additional works, agreed to charge the premises with the further sum of 200*l.* per annum, in addition to the former sum of 200*l.* per annum which had before been granted.

The bill further stated that Thomas Willows executed a deed poll dated the 26th of November 1807, and endorsed upon the indenture of the 30th of September 1806, whereby, after reciting that the Appellant had, at the request of Thomas Willows, advanced considerable sums to Mr. Boyd, which had been expended or applied towards the improvement of Saville-

ous authorities, all of them conclusive on that point: *Radcliffe v. Fursman* (c), *Stanhope v. Roberts* (d), *Richards v. Jackson* (e), *Brune v. Rawlings* (f), *Bolton v. The Corporation of Liverpool*, referred to by the plaintiffs in error, *Newton v. Beresford* (g), where Lord Lyndhurst, C.B., held that cases in the possession of a rector, which he or his predecessors had stated for the opinion of counsel, might be produced in a cause instituted by parishioners against their rector. But the question of compulsion, as one of their Lordships observed, did not arise in this case. The case was produced by the plaintiff below.

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The next question related to the operation of the statute of 10 *Henry* 7. That Act was, in its terms, sufficiently comprehensive to resume everything that had been granted in Ireland by the kings of England since the last year of the reign of *Edward* 2; but it was argued for the plaintiffs in error that it had not that effect with respect to the grant made by King *Edward* 4 to Bishop *Sherwood*, on three grounds; *first*, that it did not contemplate corporations; *secondly*, that the advowsons in question had been the private property of King *Edward* 4, and that the Act only resumed grants of property held *jure coronæ*; *thirdly*, that the advowson having become severed and in gross, could never be re-appended to the manor of *Rathweir*, from which it had been severed. The distinction between natural and artificial persons was well established, but the statute of non-claim in respect to fines (h), which only spoke of persons and their heirs, and was silent as to corpora-

(c) 2 Bro. P. Cases, 514.

(f) 7 East. 279.

(d) 2 Atk. 214.

(g) You. 377.

(e) 18 Ves. 472.

(h) 10 Car. 1. sess 2, c. 8 (Irish).

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tions and their *successors*, was nevertheless held to extend to such corporations as had an absolute estate and authority, such as mayor and commonalty, dean and chapter, colleges, &c.: *Croft v. Howell* (i). Sole corporations were not included in that decision, not because the word "persons" was not sufficiently comprehensive, but because they had but a limited estate and authority, and their acts required the assent of third persons. This statute, however, of 10 Henry 7 was applicable to corporations sole and aggregate as well as to individuals. The words were "by whatever name or names they be named," by which was intended the designation of the grantees, and not merely their names and surnames. The statute used expressions applicable to all descriptions of persons, who could be seised under all former grants; it was not confined to such persons only as were capable of being seised in any particular way; it extended to all who could be seised in any possible way. The principle which ought to govern this case was, that the statute was made for the benefit of the King; its object was to increase the royal revenue at that period, when the King's resources were so much required in order to suppress the outrages by which the country was so severely afflicted, which outrages were adverted to in the preamble of the statute. The principle of construction was stated in *Com. Dig.*: "A statute made for the benefit of the king shall be construed most beneficially for him." (k) The same doctrine was recognised in the case of *Reniger v. Fogossa* (l). It was objected that this doctrine did not apply to advowsons, as they were not productive of income to the Crown. But the King's rent-books abounded with entries of rents reserved from spiritual

(i) Plowd. 538. (k) *Com. Dig. Tit. Parl.* (R. 21.) (l) Plowd. 11.

possessions. The proviso annexed to the statute in express terms referred to advowsons, and certain corporations were excepted from its operation.

With respect to the argument that this advowson was the private inheritance of King *Edward* 4, it was respectfully submitted that whether the manor of *Rathweir* be regarded as having been held by King *Edward* 4, as private property, or as regal property, whether it descended to King *Henry* 7 *jure coronæ* or *jure uxoris* was wholly immaterial; it stood directly affected by the words of resumptive operation of the Act, which related to property "whereof any of the King's progenitors, Kings of England, were seised in fee simple or fee tail, at any time theretofore." The introduction of the words "fee tail" would naturally lead to the conclusion that private property was contemplated by the Act, and on the other hand, that it extended to the Crown property, for the words were, "whereof any of the King's progenitors, Kings of England, were at any time seised." From the evidence in the cause it was manifest that the predecessors of King *Henry* 7 were seised of this property, because, in the first place, on the attainder of the *De Lacy* family it reverted to the Crown; it afterwards was regranted to the *Mortimer* family, and upon their forfeiture it was resumed into the hands of the Crown. It was stated that there was a recital, in one of the documents given in evidence, of a reversal of that attainder. But be that as it might, the property literally came within the description contained in the Act of Resumption. The whole doctrine as to the effect of the junction of the natural person and the body politic of the King was stated in the cases of the *Duchy of Lancaster* (m), and *Willion v. Berkley* (n), and

(m) Plowd. 212.

(n) Ibid. 223.

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Co. Litt. 15 b. Before the statute of uses, if a person seised to the use of another became King, he would immediately hold the lands discharged as to the use, and that in consequence of his acquirement of the royal dignity. Chief Justice *Holt*, in the case of the *Queen v. Smith (o)*, said, "The King can have nothing in his natural capacity, if it be not in right of his Duchy, or an estate tail by the statute *de donis*; for if the King purchase land to him and his heirs, he shall have it in his politic capacity, and wherever the King is said generally to be seised, it shall be intended a seisin *jure coronæ*." The inquisition here found that King *Edward 4* was seised, and on the authority of this case he was seised *jure coronæ* at the time of his death. Whatever therefore might have been the original right of King *Edward 4* to the manor of *Rathweir* and its dependencies, the moment he became King, he held it as King, and he could have granted it in no other manner than as King, and consequently, whether he was to be considered as holding *jure coronæ* or *jure privato*, his right corresponded with the designation referred to in the statute 10 Henry 7, as a manor and advowson "whereof some of the King's progenitors, Kings of England, were seised in fee simple or fee tail."

As to the inquisition set forth in the bill of exceptions, it was to be observed that it was on the face of it historically inaccurate, though correct in the result. The daughters of King *Edward 4* were not coparceners as there stated. *Elizabeth* should have succeeded alone. Her brothers also, as one of their Lordships observed, were overlooked in that document, as though they never had existence, and so was

(o) 7 Mod. 78, and Cro. James, 248.

King *Richard* 3, who probably, as king, possessed this property after the death of *Edward* 4. But it was upon the whole quite immaterial in what right King *Edward* 4 was seised of the property, and whether there was or not evidence of its having been private or public property, and the House would not therefore send the cause to a new trial upon an immaterial issue. The contention here as regards this property was, that it was private property. In the thirteenth plea of the bishop it was pleaded for his Lordship, "that said plaintiff ought not to have or maintain his action aforesaid thereof against him, because he saith that, long before the time in said fifth count mentioned, his late Majesty King *Edward* 4 was seised of said advowson of said church in gross, as of fee in right of his crown of Ireland, &c." That statement was only by way of inducement, but it was an assertion of the defendants below on the record, to which the plaintiff might apply the maxim found in the fourth institute, that *allegans contraria non est audiendus*.

Observations were made on the term "progenitors," seeking to confine it to a meaning synonymous with forefathers. Was it to be conceived that King *Henry* 7 intended by this statute to revoke all the grants which had been conferred by his family upon their adherents, and to leave undisturbed the grants that had been conferred by the princes of the House of *York*, the enemies, as he conceived, of his House? But even taking the term in the limited sense to which the plaintiffs in error would cut it down, it fully answered the description in the Act of Parliament, because it was evident on this record that this property was in the seisin of the Kings *Edward* 2 and *Edward* 3, who were the progenitors, even in that confined sense, of

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King *Henry 7*, *Edward 3* being the father of *John*, Duke of *Lancaster*, from whom the Lancasterian line derived their descent. But there was an important contemporaneous exposition of the term “progenitors” in an Act of Parliament made in Ireland in the same year, 10 *Henry 7*, cap. 22, for re-enacting in Ireland the English statutes. “Item, prayen the Commons, that forasmuch as there had been many and divers good and profitable statutes late made within the realm of England, by great labour, studie, and policie, as well in the time of our Sovereign Lord the King, as in the time of his full and royal *progenitors*, late *Kings of England*, by the advice of his and their discreet counsel, whereby the said realm is ordered and brought to great wealth and prosperity, and by all likelyhood, so would this land if the said statutes were used and executed in the same, wherefore be it ordeyned, &c., that all statutes late made within the said realm of England, from henceforth be deemed and used, &c., in Ireland, &c.” Was it to be contended that the people of Ireland, whose lives and fortunes were thenceforward to be governed by the statutes of England, were to search through them, and select such as were enacted merely in the reigns of Princes of the House of *Lancaster*, and to reject all statutes that happened to be enacted when a prince of the House of *York* was on the throne? The absurdity of such an argument would illustrate the forlorn grounds on which it was sought to struggle against the judgment of the Court below in this case.

Another argument urged for the plaintiffs in error was, that, the grant to Bishop *Sherwood* by *Edward 4*, having dis-appended the advowson from the manor, it could not be afterwards re-annexed. If, by an act of the parties, an advowson were dis-appended

from its principal, whether that principal were a manor or any other species of property, it never could be re-appended by any act of the parties. But it might be re-appended by operation of law. *Mal-lory* on *quare impedit* (*p*), lays down that if a man seised of a manor to which an advowson is appended, leaseth the manor for life, reserving the advowson, this at common law made it an advowson in gross; but when the estate for life is determined, it becomes appendant again; and he refers to *Watson* 61, *Hobart* 315, *Plowden* 170 and to Sir *Moyle Finch's* case (*q*), in which it was held, "If upon a partition (between coparceners), an advowson appendant is allotted to one, and the manor (to which it was appended) to the other, and afterwards one dies without issue, whereby the law unites them again, in this case the advowson, which was once severed, is now appendant again." In the *King v. the Bishop of Chester* (*r*), the doctrine is thus laid down: "Tenant in tail of a manor, to which an advowson is appendant, reversion to the Queen in fee; tenant in tail commits treason, then the Queen in reversion usurps; by this the advowson is in the Queen in gross; afterwards tenant in tail is attainted, the advowson is become appendant again, because, by the attainder, the estate tail is extinct, and the Queen is seised in her reverter." Many cases had established the principle, that although no act of the parties could restore the appendancy, yet by act of law the advowson might be again annexed to the principal from which it was severed. To apply that doctrine to the present case, could there be a more effectual re-annexation by act of law than that produced by this statute? The

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(*p*) p. 39.

(*q*) 6 Rep. 64. a.

(*r*) 1 Lord Raymond, 302.

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only act of severance alleged was the grant by King *Edward* to Bishop *Sherwood* of the advowson, distinct from the manor. But this statute annulled the Act by which the temporary severance was caused, and restored the properties to their original union.

The fine alleged to have been levied by William, seventh Earl of *Clanricarde*, to *Brown* and *Mulledy*, was not pleaded, yet, although objected to, it was received in evidence, and permitted to go to the jury. The plaintiffs in error were estopped by their implied admissions on this record, from relying upon the fine. The date of the fine was 1 *James* 2, that is, 1685. The declaration alleged that *William*, seventh Earl of *Clanricarde*, the supposed cognusor of the fine, died the 10th of October 1687, seised of the advowson in gross, leaving *Rickard* his eldest son, who became the eighth earl, and *John* his second son; that thereupon *Rickard*, the eighth Earl, became seised of the advowson in gross; that on the 6th of April 1708 *Rickard* having died without issue, and *John* being a Catholic, the advowson vested in Queen *Anne* (under the Irish Act of 2 *Anne*, to prevent the further growth of popery). These allegations of events in the *Clanricarde* family, which were not traversed, could not have taken effect if the advowson had been passed out of the family in 1685 by the operation of the fine. The declaration alleged a subsequent vesting of the advowson in King *George* 1, under the 2d *Anne*. Then the seisin of *Michael*, the tenth earl, was traversed by the clerk, but his conformity to Protestantism, and the re-vesting of the estate in him, by virtue of that conformity, which were stated in the declaration, were not traversed, and the seisin of his son *John*, the eleventh earl, who inherited by virtue of his father's conformity, was also admitted, at least not traversed. So

in like manner it was averred in the declaration, that upon the death of the eleventh earl, *Henry*, the twelfth earl, became seised, and that seisin was not traversed; but the appointment by the deed of March 1785, under which the plaintiff below claimed, was traversed, and that brought the case within the authority of *Cowlshaw v. Cheslyn* (s), where it was held that traversing the grant by a person averred to have been seised, but whose seisin was not traversed, admitted the seisin, and evidence to the contrary (as the fine here would be) ought not to have been received. The events mentioned, so incompatible with the imputed operation of the fine, were admitted by the pleadings, but it was sought to throw an increased burthen of proof on the plaintiff, by reason of a general traverse pleaded by the clerk, viz., to the allegation that "it belongs to the plaintiff to present." With respect to that traverse the ancient reports abounded with cases of *quare impedit*, and numerous pleadings in this form of action were set forth at length in the old books of entries, but there was not an instance to be found in the whole series of a declaration in *quare impedit* that did not conclude with an averment, that therefore by reason of the facts antecedently stated "it belongs to the plaintiff to present;" and in the whole series there was not one instance of a plea in these terms. The cases of *The Grocers' Company v. The Archbishop of Canterbury* (t), and *Thrale v. The Bishop of London* (u), did not deserve the name of exceptions to the principle. In the former that passage is introduced in the replication, not in the plea. It was a traverse by the plaintiff himself in his replication, that it belonged to him to present. There was a *dictum* subjoined to that

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(s) 1 Crompt. & Jer. 48.

(t) 3 Wilson, 214.

(u) 1 H. Blackst. 376.

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case of Lord Chief Justice *De Grey*, from which it might be inferred that such a traverse as that would not be disapproved of by him. In the report of the same case, by Sir *W. Blackstone* (x), that *dictum* imputed to Lord C. J. *De Grey*, by *Wilson's* report, was not mentioned. The case of *Thrale v. The Bishop of London* was also a traverse in a replication ; deemed so immaterial a traverse, that the defendant then passed it by in the rejoinder, and traversed the inducement to it, contrary to the principle of pleading, that a traverse cannot be had upon a traverse ; nevertheless that traverse was allowed to be good, from the immateriality of the traverse in the replication. These were cases of mixed law and fact which were traversed, whereas the allegation at the conclusion of a declaration in *quare impedit* was a mere inference of law, deduced from a multitudinous statement of facts. The defendants below traversed specially every allegation which they required to be proved, and the plaintiff established all those allegations by evidence. The general traverse, if it put the plaintiff upon any proof, would demand proof of the whole matter of the count, and if so, what could be the use of a number of special traverses ? It would be giving to this novel plea all the effect of a general issue in a form of action in which there was no general issue : *Mallory*, p. 210, *Read v. Brookman* (y), and *Glover v. The Bishop of Litchfield* (z), *Stephen* on Pleading, p. 173. It was manifest that the pleader here did not calculate upon such an effect from this plea, because if he had he would not have introduced, as he did, so great a number of special pleas in aid of it. It might be asked, how did the admission of this plea, and the

(x) 2 Sir W. Bl. 770.

(y) 3 T. Rep. 151. 158.

(z) Hob. 162.

extended effect sought to be given to it, injure the plaintiff below, seeing that the defendant might specially traverse every allegation in the declaration? The answer was, that if the defendant were so to abuse the indulgence of the Court by unnecessary or vexatious traverses, the rule for liberty to plead several matters would be rescinded, as was done in the case of *Gully v. The Bishop of Exeter* (a), where numerous pleas of this description were referred to one of the judges to be reviewed, and his lordship struck out a great many of them, retaining several, and amongst them one with respect to the possession, similar to the one here. But if his lordship thought that plea opened the whole case to the defendant, and threw the burden of proof of all the allegations on the plaintiff, his lordship would have decided that that single plea would have sufficed, and he would have struck the whole out except that one. The alleged fine, if it had any operation, would have the effect of conveying away the property not only from the house of *Clanricarde*, but also from the Bishop of *Meath*, by whose collation the other defendant pleaded that he was parson imparsonnee of this benefice. The attempt to enforce such evidence was an implied admission of the absence of title in the clerk's patron, inasmuch as no act of an Earl of *Clanricarde* could convey the advowson if it had belonged to the Bishop of *Meath*.

It was alleged that the Bishops of *Meath* had long continued to exercise the right of collating to this benefice. But it appeared from the record that that allegation was unfounded. But, assuming that numerous collations had been made by the Bishops of *Meath*, that would not advance the argument in favour of the

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(a) 5 Bing. 171; 2 M. & P. 266.

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money, amounting to the sum of 955*l.*, to his report annexed; and also several sums of money in respect of occupation rents, amounting together to the sum of 832*l.* 6*s.* 8*d.*, and he found that these several sums amounted, in the whole, to the sum of 24,361*l.* 14*s.* 9*d.*, but he found that John Broom, John Harris, and Herbert Broom, or some or one of them, or some person by their order, or for their use, paid, &c. in taxes, rates, and otherwise, on account of the premises, several sums of money, amounting to the sum of 10,265*l.* 14*s.* 10*d.*, and he found that no part of such payments was at any time applicable to, or payable on, the rent of 200*l.* a-year; and in order to ascertain whether any thing remained due upon the mortgage for 3,000*l.* which was vested in John Broom, and Herbert Broom, deceased, he had proceeded to take an account of the principal and interest due on such mortgage, down to the period at which he found the same was paid off, as therein mentioned, and he found that such principal and interest amounted to the sum of 4,878*l.* 15*s.*, and he found that the rents and occupation rents which accrued due, prior and up to the 25th day of December 1819, amounted to the sum of 10,255*l.* 1*s.* 8*d.*, and he found that the payments and disbursements which were made and retained thereout, up to the same period, amounted to the sum of 5,305*l.* 12*s.* 5*d.*, which sum being deducted, left an ultimate balance of 4,949*l.* 9*s.* 3*d.*, due in respect of such rents and occupation rents, on the 25th day of December 1819, and which balance of 4,949*l.* 9*s.* 3*d.* exceeding the sum of 4,878*l.* 15*s.*, the amount due for principal and interest to that period by the sum of 70*l.* 14*s.* 3*d.*, he found that the mortgage must be considered as paid off on the 25th December 1819; and he found that the

as supreme patron, and his presentation through the patron's default is an affirmance of the patron's right, and maintains the possession of the true patron." So that collations by the Bishops of *Meath*, if they had made them, would not be evidence of title in them; but, in truth, they did not collate to this living.

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[Lord *Brougham*: As to the effect of the *user* of the Bishop collating for a series of years, I agree that such series of collations, at the end of six months, is an equivocal act. It may be referable either to his title as patron, or to his office as attorney of the patron; but suppose a series of collations, each within three months of the avoidance, how in that case would they be referable to the Bishop's title *quasi* attorney of the patron? Would not that have some force in the argument between him and the patron?]

A collation within six months would clearly be an equivocal act, because the bishop is not then entitled to collate for lapse, and it may be that he is assuming either to collate as patron, or provisionally till the patron shall nominate. The authorities prove that it is his duty not to suffer the wants of the parish to be unprovided for, even for six months. But the moment the patron comes forward with his presentee there is an end to the collation. It is always open to impeachment by the patron; but if the bishop allows the six months to elapse and he then collate, in that case he is bound in common justice to state in his books that he collated upon the lapse of the patron, and then there is a recorded admission of the plaintiff's title. That is an act, the neglect of which is universally complained of in Ireland.

It is material to give attention to the facts upon the record. The utmost diligence that has been exercised

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cannot trace more than nine instances in which this benefice has been filled. The property belonged originally to the *D'Arcy* family. In 1529 *Dermott Martin* was presented by *William D'Arcy* upon the demise of the preceding incumbent, who was *Thomas D'Arcy*. Then the property came to King *Henry 8*, and he exercised the right by presenting *William Cocks*. In 1615 appeared the entry of Mr. *Carter*, being the incumbent, Lord *Clanricarde* being the patron; and in 1626, *Edward Donnellan* was presented by *Richard*, fourth Earl of *Clanricarde*. In 1660 came *Barry's* presentation, by the grant of the Earl of *Clanricarde*; and in 1691 Mr. *Warburton* was instituted by the Crown, upon the promotion of the preceding incumbent. These were seven out of nine instances; one of the remaining two was the usurpation of Bishop *Dopping*, who collated his own son in 1695, and the second was the collation of the last incumbent, Mr. *Wynne*, while Lord *Clanricarde* was a minor and living abroad. There is no instance of the alleged grant to Bishop *Sherwood* having been acted upon. Two writs of *quare impedit* were sued out against Bishop *Dopping*; he complained to the House of Lords in Ireland of a breach of privilege committed in his person against the House. The attorney was brought to the bar and discharged, upon making an apology. There was no verdict of a jury or judgment of a court in that case.

It is competent for your Lordships in your appellate jurisdiction to look to the whole of the evidence as set out upon the record, and, if your Lordships should be satisfied that, independently of any evidence to which any objection was urged, a title was legally established in favour of the plaintiff below, to confirm the judgment. There are several cases in

which that principle has been recognised, as in Lord *Teynham v. Tyler* (e). The Court would not there grant a new trial upon the ground of improper evidence having been admitted, there being enough on the report of the learned judge to satisfy the Court that the verdict was right, independently of the evidence objected to. In *Edwards v. Evans* (f), the same principle had been applied upon a rejection of evidence which, if received, could not alter the verdict; and the same doctrine was held by this House in *Maccabe v. Hussey* (g). Upon the authority of the case of Lord *Teynham v. Tyler*, we submit the converse of that proposition, not however by any means admitting that there has been a particle of evidence here received which should have been rejected. A court of error will look to the whole of the evidence to see whether it be sufficient to sustain the verdict, although the exception referred to the evidence on one side only: *Vines v. The Corporation of Reading* (h).

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Sir *William Follett* for the plaintiffs in error, in reply :—The defendant in error put his title upon one grant, and one presentation and institution under it, supported by documents which were improperly admitted in evidence, whereas upon the face of this record the living had been continually collated to from the year 1626 by the Bishop of *Meath*, and it was only in 1828 his right was called in question. The record showed that, in 1626, Dr. *Edward Donnellan*, upon whose presentation the defendant in error counted, was collated by the Bishop of *Meath*; that in 1642, *Wm. Barry*, who was said to have been presented under the grant of the fourth Earl of *Clanricarde*, was collated

(e) 6 Bingh. 561.

(f) 3 East. 451.

(g) 2 Dow. & Clark, 440.

(h) 1 You. & Jerv. 4.

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with liberty to him to retain all sums received or to be received by him as such receiver, and he was to be allowed the same in passing his accounts before the Master; and it was ordered that the plaintiff should retain all sums received by him towards satisfaction of what was then due to him in respect of the arrears of the two annual sums of 200*l.* and 200*l.*, and what might become due in respect of such annual sums: and it was ordered that it should be referred to the Master to continue the account of the 200*l.* original rent, and also to take an account of what was due to the said plaintiff, in respect and on account of the said second rent charge of 200*l.* per annum, created by the deed poll of the 26th day of November 1807; and his Honor declared that Rebecca Broom and John Harris were liable to pay the sum of 4,409*l.* 19*s.* 4*d.*, the amount found due by the report of the 10th day of May 1833; and that Rebecca Broom was liable to pay the sum of 4,807*l.* 5*s.* found due by the report, towards satisfaction of what is due to the plaintiff in respect of the annual sum of 200*l.* of which an account had already been taken, and of the additional 200*l.* per annum, of which an account was thereby directed; and the defendant Rebecca Broom not admitting assets, it was ordered that she come to an account before the Master, and the plaintiff applying to have the accounts directed by the decree to be taken against the defendants John Broom and John Harris, and the estate of Herbert Broom taken with half-yearly rests, and the defendants, the accounting parties, admitting as a fact, that the result of such accounts would be to increase the balance found due from them to an amount exceeding what is due to the plaintiff in respect of the arrears of the two annual sums of 200*l.* and 200*l.*, his Honor did declare, that the estate of

advowson of the church was appendant to the manor of *Rathweir*. In the fourth year of the reign of *James 1*, a fine was levied by *John King* and his wife to *Richard*, fourth Earl of *Clanricarde*, of the manor of *Rathweir*, with all advowsons and other appurtenances to the said manor belonging, so that *John King* also passed only the manor with the advowsons belonging to it. Then a King's letter, dated the 8th of April, 6 *James 1*, directed the acceptance from that fourth Earl of a surrender of all his manors and temporal and spiritual possessions and hereditaments in *Ireland*, with a view that a new grant of the same should be made, and a commission was issued to inquire into the same; and by an inquisition taken the 4th May 1609, it was found that the then Earl of *Clanricarde* and his ancestors were lawfully seised in their demesne as of fee of the manor of *Rathweir*, with all appurtenances belonging to the same, by purchase from *John King*, specifying, among other things, the said manor and all advowsons of churches and vicarages in any manner belonging to the same. There again there was nothing said about the advowson of this church; no advowson was mentioned by name, but simply the manor with its appurtenances; nor was this advowson expressly mentioned in any of the conveyances to the *Clanricarde* family. Such being the title under which the plaintiff below claimed a right to present his clerk, the question was, whether the advowson was, at the time of the grant by King *James 1*, appendant to the manor, and did it pass by the grants? Was there any evidence of the title set up, except in the two documents mentioned in the bill of exceptions? There was a deed, dated in 1744, which recited that *Richard*, late Earl of *Clanricarde*, by indenture dated 6th April 1702, and made between the

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said *Richard* and *John Morgan*, the elder, conveyed unto the said *John Morgan*, his heirs and assigns for ever, (among other things,) the advowson or right of patronage of the rectory of *Rathweir* and *Killucan*. That was the only deed in which the advowson was mentioned by name, and that deed destroyed the title of the *Clanricarde* family, by showing that the advowson, if it ever belonged to them, was conveyed away from them.

The first plea of the Bishop to the fifth count of the declaration traversed the appendancy of the advowson to the manor of *Rathweir*. There was, therefore, a distinct issue raised on that fact. The next material plea was a denial that *Richard*, the fourth earl, was seised of the manor with the advowson appendant; and there was also a denial that *Edward Donnellan* was instituted and inducted on the presentation of *Richard*, the fourth earl. The plaintiff below, to prove the facts so put in issue, offered a deed of grant, which was stated to have been found in *Lowton House*. It was not pretended that that was an act of the fourth Earl of *Clanricarde*, whose seisin was traversed, or a presentation of *Edward Donnellan*, whose alleged presentation was traversed. It had been contended, that the defendants below had no right to offer in evidence a certain fine, because it was not properly admissible upon any of the issues. But upon what issue was the alleged grant of *Ulick*, fifth Earl of *Clanricarde*, or the presentation of Mr. *Barry*, admissible evidence, unless it was upon the general issue, to prove the title of the plaintiff below? Was it because *Ulick*, the fifth earl, granted the next presentation to Dr. *Donnellan* that therefore *Richard*, the fourth earl, was seised of the advowson, or what proof did that afford that *Edward Donnellan* was pre-

sented by the fourth earl? The deed of grant, supposing it to be genuine, was admissible in evidence, because it showed the title of the *Clanricarde* family, under which the plaintiff below counted, and therefore under the general traverse, no doubt, the deed of the fifth Earl of *Clanricarde*, or the presentation under it, by the representative of Dr. *Donnellan*, would be admissible in evidence; but it was not evidence under the special traverses. It was important for their Lordships to bear in mind that the most material document put in evidence for the plaintiff was received, not upon a distinct issue or traverse, but upon the general traverse, upon which, however, the counsel for the plaintiff contended that the fine offered by the defendants was not admissible in evidence.

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Supposing that the documents were receivable in evidence upon the pleadings as they stood, if properly authenticated, the next question was, whether they were authenticated. According to the established rules of evidence, neither the deed nor the case ought to have been submitted to the jury. It was argued for the defendant in error that a deed thirty years old, and brought from the proper custody, did not require proof of its execution. But the question here was, did this deed come from the proper custody? That question applied to the case as well as to the deed. As to the case, supposing it properly authenticated, there was another and distinct objection to the reception of it in evidence, as being a statement made for the opinion of his counsel by a client whose rights and interests and privileges became vested in the present Bishop of *Meath*.

First, with respect to the deed, the proof that it came from the proper custody was upon the plaintiff below. It had been assumed that the deed had been

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found in the custody of a descendant of a former Bishop of *Meath*. The evidence proved no such thing. It should have been shown that *Anthony Dopping*, who produced it, was that species of descendant who was likely to have the papers of Bishop *Dopping*, and that they were properly in his custody. That was not shown, and therefore, as far as regarded authentication, these papers might as well have been produced at the trial by a stranger. Sir *William Beetham* said, he went to *Lowton House*, and found a parcel of papers in a room with other papers, and that he handed them to Mr. *Sirr*; that *Lowton House* was inhabited by a Mrs. *Dopping*, but whether she was connected with the family of Bishop *Dopping* did not at all appear. Sir *W. Beetham* put no mark on the papers. There were in the same room visitation-books and other papers relating to the see of *Meath*, several of which were in the parcel which he brought away. These other papers were not produced at the trial. Suppose a witness to state that he found certain papers produced, with a book, which he said was a visitation-book of the diocese of *Meath*, but upon inquiry it turned out to be a book belonging to the Diocese of *Ossory*, did not the supposition suggest the extreme danger of allowing a witness to state the contents of a written paper? If the deed was to receive authenticity upon the ground that it was found with the visitation-book of the diocese of *Meath*, it was most important that the book should be produced to show that it was, in fact, such visitation-book, especially as *Lowton House*, where the documents were said to be found, had no connexion with the registry of the diocese. If a witness went to the proper place of custody for a will, and said he found it among the wills of a certain date, he need not

produce the other wills to prove that they bore that date. But if, as in this case, a witness went to a house not proved to be connected with the bishop or the diocese, and produced a paper from it, if such paper was to receive authentication by other papers that were found with it, those papers should be produced, that the Court might see whether they answered the description given of them by the witness. The case was different when the paper was produced from a place where such documents ought to be, like the title deeds of an estate brought from the muniment-room of the owner, or office of his attorney or banker. If the witness had been to the bishop's registry and produced the deed from the place where the visitation-book or the presentations were kept, that evidence would be sufficient to authenticate it without producing those other documents. But where the whole effect of this document was to depend on the papers which were found with it, and they were found in a place where one would not expect to find them, in order to authenticate the deed, the other papers should be produced, otherwise parol evidence of the contents of papers would be admissible to make an ancient document evidence, which would be a most dangerous rule to lay down. If the finding of the document at *Lowton House* was material, should not Mrs. *Dopping*, who inhabited it, or somebody connected with that house, have been called as a witness to authenticate those papers? They might have been put on a table in that house for the express purpose of being found by Sir Wm. Beetham. *Anthony Dopping* had no knowledge of them. If they belonged to the *Dopping* family, ought not some person to have been produced who could prove that fact, and that they were kept and found in the usual place of deposit. There was something extremely suspicious about the production

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of this deed, independently of the question of admissibility in evidence. It was a cancelled deed, and without a seal. It purported to have been executed in the year 1637. How did this deed get into the possession of Bishop *Dopping*, who was not Bishop of *Meath* until long after that date? It professed to be a deed granting the next presentation to Dr. *Edward Donnellan*. Where should that deed be? Not in the custody of the bishop, but with the grantee. If a search had been made among the papers of the family of the grantee, and the deed had not been found there, but was produced from the registry of the diocese, it might be justly said, that although the deed would most properly have been in the possession of the grantee, yet inasmuch as the bishop had acted on it, and it was found among the diocesan records, the Court must, under such circumstances, admit it in evidence.

Numerous cases were referred to on this point. The case of *Bullen v. Michel* (*h*), on which the plaintiff below mainly relied, differed from this, and was an authority to show the deficiency of his evidence. A monastery on its dissolution had come into the King's hands; he had granted it out again; a portion of the possessions had been granted to a person under whom the Earl of *Bath* claimed; the Earl had in his muniment-room the title deeds relating to that property, and among other deeds was found a chartulary of the abbey. Upon proof of these facts, it was held that the document came from the proper custody; for Lord *Bath* was possessed of part of the land to which the document related. But if there had only been evidence that A. B. had gone into the house of Lord *Bath*, and brought away that chartulary without proof how it was kept, and without connecting Lord *Bath*

(*h*) 2 Price, 399.

with the monastery, it could not be received as sufficiently authenticated. The case of *Randolph v. Gordon* (i) also was an authority against the admission of this evidence. There the Lord Chief Baron, holding that the book coming out of the defendant's custody was not admissible, said that though the defendant was the grandson of the former rector, yet he might have got the book from somebody else, who handed it over for the purpose of having it produced. In *Potts v. Durant* (k) a document was rejected, because it came from the custody of a private person; so also in *Michell v. Rabbetts* (l), although it came from the Bodleian Library; and so again in *Swinerton v. Marquis of Stafford* (m), although it was brought from among the Cottonian MSS. in the British Museum. In *Atkins v. Hatton* (n) a terrier was rejected, because it was not found in the registry of the bishop or archdeacon of the diocese, though brought from the charter chest of *Trinity College, Cambridge*. So in *Miller v. Foster* (o), as to a terrier found in the registry of the Dean and Chapter of *Litchfield*. *Earl v. Lewis* (p) was a case where the papers were delivered by the son of a deceased rector to the attorney of his successor, and they were held admissible without producing the son, the connexion between the custody of the papers and the estates being established.

The objection to the deed in the present case, as not being admissible from defect in the proof of the custody, was applicable equally to the case. The deed was most material evidence, supposing it to have been acted upon, but of that fact there was no evidence. But an attempt was made to show that the deed was acted upon, by the production of this case, for without the

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(i) 5 Price, 312.

(k) 3 Anstr. 789.

(l) Cited 3 Taunt. 91.

(m) Ibid.

(n) 2 Anstr. 386.

(o) 2 Anstr. 387 n.

(p) 4 Esp. 1.

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Broom held the other moiety of the mortgage. It was then supposed that the property was capable of great improvement. The Respondent wanted rooms for her exhibition, and applied to Willows, who was the owner of the property. Though she was a mortgagee, she never was mortgagee in possession. She was mortgagee of the premises, and she became tenant of part of them under a special agreement, but that did not make her mortgagee in possession. The arrangement as to the improvement of the premises rested solely between Willows and Page. Page doubted whether Willows would have the means of paying him; and in consequence of that, the agreement was drawn up, which gave Page a certain interest in the premises, and he was to receive the rents, which were to be considered as instalments in payment of the debt Willows was about to incur. She was not a party to this, except so far as to consent that her mortgage was not to stand in the way of the payments to be made to Page. The arrangement made was quite independent of her rights as mortgagee. She was to have a lease of a part of the premises, and to pay 1,000*l.* for it, and 250*l.* a year rent. This agreement in which she joined, was the only transaction in which she was concerned with Page up to the time of the bill filed in 1827, and he himself does not in his bill affect to charge her as mortgagee in possession. If any one is to be blamed for the delay, it is Page himself, who might have obtained the 1,000*l.*, and the rent, if he had chosen to grant the lease according to the terms of the agreement. The attention of the Court was directed to the two distinct claims of interest on the rent and on the 1,000*l.* One was put on the matter of right, the other on the matter of agree-

evidence against a party, when it is made against his interest, he having no motive to misstate or misrepresent, was stating the proposition too broadly, and accordingly the courts have narrowed the rule, which was considered as settled in *Higham v. Ridgway*. In *Chambers v. Bernasconi* (r) it became important to ascertain the date of the arrest of a bankrupt. The sheriff's officer who arrested him having died, a return made by him to the office of the sheriff of *Middlesex*, stating the arrest to have taken place at a certain place, and on a certain day, was offered in evidence; and it appeared that the sheriff's officer was bound to make a return of the time and place of every arrest made by him. Lord *Lyndhurst*, C. B., admitted that document in evidence, but the Exchequer Chamber afterwards decided that the document was not evidence of the place or day of the arrest. Every entry or statement made by a person, even against his own interest, or having no interest to misrepresent, was not therefore receivable in evidence; and to bring this document within the authority of the cases, it should be shown to be a statement, by a party charging himself, so made as to render him liable to some duty or action. If this document were receivable in evidence at all, it must be upon the ground that it was a statement made by the Bishop of *Meath* against the interests of that see. That must have been the ground on which the Court in *Ireland* received it, and not on the general ground of its being a statement made against the interest of the party. If it were proved that during the time when a certain person was Bishop of *Meath*, he made a declaration touching that diocese, against his interest in his corporate

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and the present resemble each other. It is clear that annual rests cannot be directed as of course, but under special circumstances only, and never for a broken period: *Davis v. May* (c). The same rule was acted on in *Webber v. Hunt* (d).

Mr. *Pemberton*, in reply :—It is clear that from the time the Respondent took possession she was in the situation of a prior mortgagee to the Appellant, with the right of an immediate redemption existing in him. They never stood in the relative situation towards each other of landlord and tenant. The account therefore, is not an account of rent, and the Court had authority to order that it should be taken with rests, and the decree of the Master of the Rolls was consequently right.

Monday,
17 July 1837.

The *Lord Chancellor* :—This is one of two appeals (*Page v. Broom*, and *Page v. Linwood*) brought by Mr. Page against different parties, upon transactions relating to the same property. The Appellant in both cases complains of an order which was made in the Court below on exceptions and further directions. The circumstances which gave rise to contest between these parties arose from a contract, by which Mr. Page, in 1806, agreed, upon certain terms and conditions, to rebuild part of a house in Leicester-square. It appeared that there had been a mortgage upon the house in question, one-half of which was then vested in Miss Linwood. The object of this agreement was, to effect certain alterations in that house and some adjoining premises. For this purpose, Mr.

(c) 19 Ves. 383.

(d) 1 Mad. 13.

Willows being then the owner of the inheritance, and Miss Linwood being the holder of one moiety of a mortgage on the premises, and it being intended that she should occupy a certain portion of them, it was agreed that rent should be paid by her in respect of such occupation, by means of which Page might be repaid for the alterations. She was mortgagee of a moiety, and it was therefore agreed, prior to any contract between Willows and Page, that she should give up the right of priority in respect of her half of the mortgage. An agreement was then made, that the premises should be rebuilt, and that she should pay a rent in respect of the part she occupied to the amount of 250*l.*, and she was to have a lease, and on its being executed she was to pay a sum of 1,000*l.* Unfortunately a great length of time elapsed after the premises were finished before Page was able to obtain any remuneration for the money he had expended, and considerable difficulties arose from that circumstance. The building was not confined to the site or the works originally contracted for, but another agreement was made, which extended the liability of Willows, but could not affect the liabilities under which Miss Linwood was placed. The case came to a decree on 26th of November 1827.—[His Lordship here referred very fully to the decree.]—So far the decree had provided for taking an account of what was due to Miss Linwood in respect of the mortgage, and from her in respect of the contract for the payment of 1,000*l.* with interest, and the 250*l.* a year as rent. Then the decree took notice of an arrangement which had taken place between Page and Miss Linwood, in order to enable him to relieve himself from the difficulties with which he was pressed.—[His Lordship referred to it.]—This provision was not intended to

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to be read. Was it not quite as much a violation of principle and of policy to receive the case through another medium as from the counsel or the attorney? If production by third persons were allowed, then an attorney to whom a confidential letter had been written might in any case collusively put that letter on a table, and allow some partisan of the writer's adversary to take it away and produce it in evidence. That could not be the doctrine of law, because it involved an absurdity, allowing parties to do indirectly that which, for the purposes of general policy, was not allowed to be done directly. Lord Chancellor *Brougham*, in *Bolton v. The Corporation of Liverpool*, says (y), "It seems plain that the course of justice must stop if such a right exists. No man will dare to consult a professional adviser with a view to his defence or to the enforcement of his rights. The very case which he lays before his counsel to advise upon the evidence may, and often does, contain the whole of his evidence, and may be, and frequently is, the brief with which that or some other counsel conducts his cause. The principle contended for, that inspection of cases, though not of the opinions, may always be obtained as of right, would produce this effect, that a party would go into court to try the cause, and there would be the original of his brief in his own counsel's bag, and a copy of it in the bag of his adversary's counsel." "If it be said, that this Court compels the disclosure of whatever a party has at any time said respecting his case, nay, even wrings his conscience to disclose his belief, the answer is, that admissions not made, or thoughts not communicated to professional advisers, are not essential to the security of men's rights in courts of justice. Proceedings for

(y) 1 Myl. & K. 88; see p. 94.

this purpose can be conducted in full perfection without the party informing any one of his case, except his legal advisers. But without free communication with them no person can safely come into a court either to obtain redress or to defend himself." A doctrine was once laid down by Lord *Tenterden*, that the protection of privileged communications was limited to cases where an action was about to be brought, and a communication was made in reference to that action: *Wadsworth v. Hamshaw* (z), *Williams v. Mundie* (a). That dictum of Lord *Tenterden's* has been overruled.

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[Lord *Brougham*:—That doctrine was considered in *Greenough v. Gaskell* (b), in which I pronounced judgment after much deliberation and consulting with Lord *Lyndhurst* and several of the judges. I there examined all the cases both of law and equity. I ought to mention, that with respect to the case of *Bolton v. The Corporation of Liverpool*, both I and Lord *Lyndhurst*—probably because we had come from the other side of Westminster Hall—had so great a dislike of acting on the inveterate, and not now to be changed practice in courts of equity, that we did all we could to limit that principle, and introduce the exception which the case of *Hughes and Biddulph* (c) and others have now introduced. We acted with the concurrence of other judges in the Court of Chancery; but we would fain have carried it a step further, according with your argument, for we felt the principle, but we were met by *Radcliffe v. Fursman* (d), decided in this House after great deliberation. That case gives the law, which we could not alter. It is not accurately

(z) 2 Bro. & B. 5, n.
(a) Ry. & Moo. 34.
(b) 1 Myl. & K. 98.

(c) 4 Russ. 190.
(d) 2 Bro. P. C. 514.

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reported (e), but the law of that case is, not to compel the party to produce the case with his answer to explain it, but to allow the case to be received in evidence without any explanation.]

Sir *William Follett*:—As to that doctrine of Lord *Tenterden's*, it happened to be delivered at *nisi prius*. If he had time to investigate the matter, he would have seen that the principle of protection applied to other cases as well as to actions pending. If it were allowed in cases of actions, should it not be allowed in the case of a party consulting an attorney as to the title of his estate? If that were not so, instead of acquiring safety by consulting an attorney or counsel, as to the title of an estate, that very consultation might lead to the destruction of one's property. If courts of justice were to allow cases laid before attorney or counsel to be given in evidence without explanation or qualification, they would destroy the principle on which the rule of privilege was founded. That principle, so well explained in *Bolton v. The Corporation of Liverpool*, would equally apply, whether it was a case laid before counsel respecting a particular action then brought or contemplated, or a case laid before counsel where no action was pending or contemplated, but a mere statement to get the advice of counsel on some supposed defect in the title of the party consulting him. Was it not essential to the security of men's rights, that they should have the power to obtain advice freely, fully, and unreservedly? Yet if this case were to be received—supposing it authenticated—would not its reception violate the principle? The case purported to be a statement of a Bishop of *Meath*,

(e) See 1 Myl. & K. p. 95.

on some supposed defect of title respecting the advowson, asking a professional man's advice on the question, how he was to act respecting that advowson. Would their Lordships allow that case which the Bishop laid before his professional adviser, in the full confidence that no possible use could be made of it against him, to be received as the only evidence on which the plaintiff professed to dispute his successor's right to present to that advowson? It might be that a court of equity might direct the production of this case, but it was a very different question whether a court of common law would receive it in evidence upon the mere production, without any explanation. There was no precedent which had gone to that extent. Among all the authorities to which the Lord Chancellor referred in the case of *The Corporation of Liverpool*, there was none in which a court of common law allowed a case to be so received. If the late Lord Chancellor and his noble and learned predecessor were so anxious to destroy that practice in a court of equity, but found themselves bound down by authority, sitting in appeals from a court of equity, their Lordships, sitting now as a court of common law, would not, it was hoped, allow that doctrine to be introduced into those courts.

As to the next question in the cause, the defence was not only a denial of the title of the plaintiff below, but an assertion of the title of the Bishop. It was not disputed that the Bishops of *Meath* were formerly owners of this advowson under a grant from *Edward 4*, and the question was, whether that advowson, so vested, had by any act been taken away. It was in evidence that the Bishops of *Meath* had been in the habit of collating to this living. There was proof of the grant by *Edward 4*, and of acts of ownership on the part of the bishops. But it was argued that, not-

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can be taken in that manner on an agreement, and a course of dealing to that effect under such agreement is binding. The accounts here must therefore be taken with rests. Such is the agreement between the parties. The other parties may claim to have the account taken with rests; and, if so, then the Appellant has a right to an equal advantage. The order to take them in that manner was properly made on further directions: *Wilson v. Metcalfe* (g). The nature of the fund out of which the payments to the Appellant were to be made does not exclude the taking of the accounts in that manner. Though that fund was by consent constituted of the rents, still the debt is by agreement a debt with rests, and must be so treated from whatever fund the payment is to be derived. The rule on this subject is as old as the time of Lord Hardwicke: *Swynfen v. Scawen* (h). The order there was made on a rehearing. In *Lowndes v. Collins* (i), it was held that where there was a written contract for the payment of money on a day certain, interest became payable from that day; and that there was no difference in that respect between notes and other instruments. It may be admitted that it is not a general rule of the Court of Chancery to allow compound interest, but here the agreement is to that effect, and that agreement is not unlawful. The fund here is not rent but ordinary instalments of an ordinary debt, and therefore liable to interest. The debt is to be reduced by instalments, and if these are not duly paid the party is entitled to interest in respect of them. The giving of compound interest is not indeed a part of the stipulation, but is the necessary result of the terms of the agreement, and of the other par-

(g) 1 Russ. 530.

(h) 1 Ves. 99. Belt's edit.

(i) 17 Ves. 27.

the Exchequer in *Dublin*, 23 *Henry* 8, whereby it was found that King *Edward* 4 was seised in fee of the manor of *Rathweir*, and had issue *Elizabeth*, *Anne*, *Cecilia*, and *Bridget*, and that being so seised, he died on the 9th of April, in the 23d year of his reign; and that after his death the said manor, with all its appurtenances, descended to his daughters, and that afterwards King *Henry* 7, and the said *Elizabeth*, his wife, as in her right, entered into the same manor, &c. It appeared from the evidence, that the manor of *Rathweir* had not been held by *Edward* 4 in right of his crown. If it had, the eldest daughter alone would have inherited the manor. The sons of *Edward* 4 were not here mentioned; it was a curious fact, that they were also omitted in a statute of Queen *Elizabeth*, tracing the property of the Queen to lands in *Ireland*. The property, by this inquisition, was traced from the natural person of *Edward* 4 to his daughters, heiresses in a private capacity; it was difficult to account for the omission of the sons; it might be that the order of descent could not be traced, as it was unknown which of the princes died first. *Henry* 7 never admitted that he held the crown in any right derived from his wife. Upon these proofs could it have been just to tell the jury that there was no evidence that the property had ever belonged to the earldom of *March*? Yet the Judges directed the jury that there was no evidence of it whatever. On that ground alone, independently of other objections, the plaintiffs in error were entitled to a new trial.

It was important to see under what seal King *Edward* 4 granted away any part of the possessions of the Earldom of *March*. It appeared by the case in *Plowden*, that the kings of *England* were in the habit of granting sometimes under the great seal of *Eng-*

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will not be given upon rent. But at all events, only simple interest will be allowed where the security for the debt is, as in this case, in the nature of a real security, *exparte Bevan* (l). The decree introduces the term "after the rate of five per cent. per annum, and according to the agreement of 1806." That cannot, however, mean compound interest unless the agreement of 1806 expressly gives it, which it does not. It is indeed doubtful whether interest could be given at all, for the money to be taken by Page in extinguishment of his debt was not merely rent, but was to be taken by him *qua* rent. But even if the interest was intended to be secured by the agreement in the manner now stated, such agreement would not be lawful. The interest would be usurious; it would be five per cent. on the principal, and then five per cent. on the interest of that principal. There is no case to show that the purchaser of an annuity is entitled to interest on the unpaid annuity. *Cotton v. West*, and *Booth v. Leycester* (m), are cases which have very recently occurred in Chancery, and interest was in both cases refused, under circumstances similar to those existing in the present appeal.

Mr. *Pemberton*, in reply :—In this case the striking of half yearly balances is the same as having half yearly rests. Now it is positively stipulated that the balances shall be struck in that manner. The reason for not allowing interest as a general rule on simple contract debts is, that if allowed, all the advantage would be on one side, but where there are, as there are in this case, mutual accounts, that reason does not exist, and interest becomes due as of course, and

(l) 9 Ves. 223.

(m) 1 Keen, 247.

the kings of *England*, by declaring that the kings of *England* shall be kings of *Ireland*, and shall have all the same rights and privileges they had in *England*. The object of the Act 10 *Henry* 7, being to take into the King's hands certain property of the Crown, from which formerly were derived certain revenues in *Ireland*, it could apply only to such parts of the Crown lands as yielded a revenue; it could not apply to the grant of an advowson in gross, which was not the subject of profit.

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The words "noble progenitors, the kings of *England* and *Ireland* in the Act," could not include King *Edward* 4, not on account of the literal meaning of the word "progenitors" as excluding *Edward* 4, but on this ground, that *Henry* 7 never in any Act of Parliament, or any document to which he gave his assent, acknowledged that any princes of the house of *York* were his "progenitors." In the Acts passed in his reign, relating to the property of the Crown, he drew the distinction between Kings *Richard* 3 and *Edward* 4, and the princes of the house of *Lancaster*, using the word progenitors as applicable to the latter, and distinguishing the other persons as not falling within that designation (*f*).

In the public Acts passed in the reign of *Henry* 7, King *Edward* 4 was not called a usurper, he was called King of *England*, but he was not called a progenitor or prince belonging to the house of King *Henry* 7. A distinction was made between him and King *Richard* 3, who was described as a person who held the crown by wrong. But the princes of the house of *Lancaster* were described as the progenitors of this king, a distinction made in all the Acts which passed in the reign of *Henry* 7. In the Act referred

(*f*) *Blowden*, 220.

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receive sums of money on account of his expenditure on the building, and that the money would bear interest, and that the rents which Page received would go in diminution of the interest. It was therefore for the advantage of Willows to provide that Page should keep half-yearly accounts. It does happen, that though this contract was made in 1806, we are now, in 1837, considering the mode in which he should be repaid for his advances. That however does not affect the contract. The amount of remuneration is not in dispute; the sums he expended are not in dispute, but it is contended that these sums from year to year were carried to the account, and as they were not received, and as interest is claimed on one side it should be payable on the other; that he ought to be in the same situation as if the money had been paid. There was an order that the Master should take an account of what was due from Miss Linwood, and it was directed that this Appellant ought to be considered to have a charge on the premises in order to supply the deficiency of payments which that account might show.

That raises another question on this appeal. It appears that before the buildings were completed, accounts were from time to time kept by Page, and interest was carried upon sums of money due to him on the face of the accounts. The decree speaks of the acknowledgment of Thomas Willows; that was made in the last of the certificates given on the making up of these accounts. It was argued at the bar that this mode of dealing between the parties amounted to a contract, that subsequent to the building being completed, the accounts of money due should carry interest throughout in the same way as Willows had allowed them to do at an anterior period. That, however, is not the meaning of the acknowledgment. It

York, or the Earldom of *March*, which descended to him before he became king, would not be affected as to the line of descent, but would go to the heir of *Edward 4*, of his natural body, and not to the King of *England*, and therefore the possessions of the house of *York*, or Earldom of *March*, instead of going to *Richard 3*, would go to the daughters of *Edward 4*. The Act of Parliament procured by *Henry 4* to separate the possessions of the Duchy of *Lancaster* from the possessions of the Crown, raised an inference that if it were not for that Act those possessions would have merged in the Crown: that was an unfounded notion; for the descent of lands of the Duchy of *Lancaster* was regulated, not by that one but by several Acts of Parliament, and, among others, by the Act which passed in the reign of *Henry 7*, after the battle of *Bosworth*. In *Willion v. Berkley (h)*, it is said, "as if a man gives land to a bishop and to his heirs, thereby he distinguishes in what capacity he has a mind to place the inheritance, and in what capacity the bishop shall take it, and as the donor pleases to limit it, so it shall enure; for if he had given the land here to King *Henry 7*, and to the heirs of his body, and of the body of *Elizabeth* his wife begotten, such heirs, and none other, should take it. And land may be entailed to the king as well as to another, for King *Henry 4* entailed the Duchy to him and to his heirs of his body begotten, and the Crown was entailed to *Henry 8* and to the heirs of his body, so that the king may take an entail as well as another, and the remainder here vested in the body natural of King *Henry 7*. So that if he had resigned the Crown to King *Henry 8*, yet he should have held the land to

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(h) Plowd. 223; see p. 250.

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objects. He thought the rents would be paid; he has failed in getting them, partly from the difficulty of the case, and partly from the indigence of some of those to whom he was opposed. But your Lordships cannot, on account of the circumstances of the case, change the contract between the parties; and though he has sustained an injury, yet it appears to me that you cannot do what he asks to remedy it. I see nothing in the contract between these parties to justify the giving of compound interest on the money due. Your Lordships have nothing to do but to carry into effect the contract, which is in writing, and by which they have agreed to be bound. The hardship upon Mr. Page you cannot redress. The grievance is one which arises from circumstances, and he must be content to bear it. I shall therefore move that the judgment of the Court below be affirmed.

Lord *Brougham* expressed his entire concurrence with the opinion of the Lord Chancellor in both these cases.

Judgment affirmed.

Sir *W. Horne*, in the case of *Page v. Linwood*, applied for some direction as to costs.

The *Lord Chancellor* :—We shall say nothing as to costs.

No application of a similar kind was made in the case of *Page v. Broom*.

taken from Lord *Hale's* manuscript, explained the distinction: "Nota, by the common law the king is a corporation, and purchases made by him after assumption of the Crown, vest in a politic capacity," &c. But those lands which the king purchased before his accession to the Crown, or which came to him by collateral descent, not from the Kings of England, remained in him in his other character, subject to all the same powers as regarded the king, as the land held in *jure coronæ*, but not subject to the same descent, as they would descend to the heirs of the parties from whom they came; to the heirs of the body of the king, if the king held them in tail, to the heirs general of the king, if he held them to him and his heirs, but not to the Crown. Whether the lands of the manor of *Rathweir* were held by the Earl of *March* in fee-simple or in fee-tail did not appear, and it was immaterial for this purpose, because in either case *Henry 7* could have had no title. The king, as such, could have had no right to them, but having married one of the four daughters entitled in coparcenary to the possessions of that earldom, *Henry 7* had in him a title in that right only. The form of the grant of the advowson by letters patent did not affect the question; for if the king granted part of the Earldom of *March*—the advowson of this living—to the Bishop of *Meath*, he might grant it in much the same form as he granted the lands held *jure coronæ*, under letters patent in his name of king. If they were lands in *Ireland*, he would follow the form of the king's grant, which is the same in substance and form with the sanction and under the authority of the Lord-Lieutenant of Ireland, as if the lands were held *jure coronæ*. And the grantee of them would preserve as evidence that copy of the

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simple or fee-tail, from the last day of the reign of King Edward 2,—and all feoffments, gifts in tail, grants, &c., of all and every the aforesaid honors, manors, &c., as before specified, as well by Parliament as by any letters patent under the Great Seal of *England* or *Ireland*, made to any person or persons by whatsoever name or names they be named, from the said day be resumed, revoked, annulled, and deemed void and of none effect in law.”

HELD, that the said Act avoided the grant, and re-appended the advowson to the manor of R., whereto it was appendant before the grant.

A plaintiff in *quare impedit*, after tracing his title through various steps, and averring the death of W., who had been shown to be a joint tenant with plaintiff of a term of years in an advowson, alleged, “Whereupon and whereby the plaintiff became and still is possessed of the said advowson as of an advowson in gross for the remainder of the said term so theretofore granted.” The defendant pleaded that he, as Bishop of M., was seised of the advowson in gross, in right of his see, without this, that the plaintiff was possessed of the advowson in manner and form as the plaintiff had alleged. HELD, that a fine of the advowson in question, levied in 1 Jac. 2, by one whose estate the plaintiff had, was not admissible in evidence under this or any similar issue.

HELD that, if admitted, it ought not to be left to the jury to say whether it barred the action of *quare impedit*.

And HELD that it did not bar the action.

THE benefice of *Killucan*, otherwise *Rathweir*, in the diocese of *Meath*, and county of *Westmeath*, in *Ireland*, having become vacant in February 1828, by the death of the Rev. *Henry Wynne*, the late incumbent, the Marquis of *Winchester* claiming the advowson thereof, as trustee for the Marquis of *Clanricarde*, presented his clerk, the Rev. *Cecil Crampton*, to the Bishop of *Meath*, as a fit person to be admitted to the same. The Bishop refused to admit him,

and was afterwards re-granted or surrendered to the owner of the manor, it did not become appendant again, but would be held by the lord of the manor in gross, distinct from the manor itself. The argument was, that this advowson was re-appended; that if the grant that severed the advowson were put an end to, then the advowson became appendant to the manor again. Taking these to be the two propositions of law, the point to be determined was, whether this Act rendered the grant of *Edward 4*, and all his successors down to the time of *Henry 7*, void *ab initio*, or whether it only annulled them from the time of the passing of the Act. Surely but one construction could be put on the Act, namely, that from the time of the passing of it, the grants that had been made by preceding kings of *England* became annulled, and that the king then took back the possessions of the Crown which had been separated from it. It was not to be supposed that an Act of Parliament could have been passed to declare void those grants from the beginning, so much injustice must on that construction have ensued. Every act which had taken place under the grants would have been an act of wrong. The very fact of the apparent owners being in possession of the land, would be a trespass; the parties would have been wrong doers, though they held under a grant from the Crown. The object of the Act was not to give to the king any by-gone right, previous to the passing of the Act, but to resume from that time the revenues of the Crown, and to render them applicable to the uses of the Crown. The language of the Act showed that there was no intention to declare that these grants were void from their very inception. It applied to the grants of manors, and feoffments made by the authority of

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king granted to *Rickard*, sixth earl (*inter alia*) the manor of *Rathweir*, with the advowson which was then appendant thereto, to the use of *Rickard*, sixth earl, in tail male, with remainders over; that the *Irish Act* of Parliament 14th & 15th *Car.* 2, confirmed the letters patent, saving the rights of persons claiming paramount the crown; that in 1666, *Rickard*, sixth earl, died without issue male, leaving *William* his brother him surviving, who became seventh earl, and being entitled under the uses limited by the letters patent, became seised of the manor to which the advowson was appendant in tail male, with remainders over; that in 1670, *William*, seventh earl, by lease and re-lease with warranty conveyed the manor (excepting the advowson) to Sir *Patrick Mulledy* in fee; that *William*, seventh earl, then became seised in tail of the advowson in gross, with remainders over; that in 1687, *William*, seventh earl, died so seised, leaving his eldest son *Rickard*, who became eighth earl, and was seised in tail of the advowson; that by the *Irish Act* 2 *Anne*, c. 26, advowsons held by persons professing the Roman Catholic religion were vested in the Crown, according to the estate of the patron till abjuration; that in 1708, *Rickard*, eighth earl, died seised without issue, leaving his brother *John*, ninth earl, who being entitled in tail under the uses limited, but professing the Roman Catholic religion, the advowson vested, under the said Act, in Queen *Anne*, and afterwards in King *George* the First; that in 1722, *John*, ninth earl, died, leaving his son *Michael*, tenth earl, who abjuring and conforming to the Protestant religion, the estate of the Crown in the advowson determined, and *Michael*, tenth earl, became seised in tail; that in 1726, *Michael*, tenth earl, died seised, leaving *John Smith*, his son, eleventh earl, to whom

the Act; that this was not a possession of the Crown, and that the Act of Parliament did not in any way apply to it; that the advowson did not here become appendant to the manor, or pass under that grant of King *James 1* to *John King* under which the Earls of *Clanricarde* founded their title; that the grant did not confer the title on that house, but the advowson was either in the Crown, if that Act of Parliament had any application at all, or if not in the Crown, it remained in the Bishop of *Meath*, under the grant of *Edward 4*.

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There was one other objection; the effect of the fine levied by the seventh earl. That was not an objection going strictly to the merits of the case. It was used by the defendants below, not for the purpose of showing a title in themselves, but for the purpose of protecting their possession by showing that it was not in the plaintiff below. The fine could not affect any title whatever in the Bishop of *Meath*, but only have the effect of excluding the claimant below. The first question was, whether or not that fine was admissible in evidence. One of the pleas of the Bishop was, that "the plaintiff ought not to have his action against him, because that his predecessors (Bishops of *Meath*) were, and he, the said Bishop, was and is seised, in the manner in the said first plea to the fifth count mentioned, of the advowson of the said church; and being so seised, he collated the same, being vacant, to the said reverend *James Alexander*, in the manner and at the time in the said first plea to the said fifth count mentioned, as he might lawfully do without this, that the said plaintiff is possessed of the said advowson of the said church of *Killucan* in manner and form as the said plaintiff hath in the said fifth count of the said declaration alleged." It became unnecessary on that

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plea of the Bishop to enter at all into the argument that the clerk could not plead any plea which would let in this fine against the Earl of *Clanricarde*.

Bishop, at all events, might so plead. But suppose the objection good, this was not the stage of proceedings in which notice could be taken of it. Their Lordships were sitting to decide whether or not certain evidence was receivable, but not on the effect of that evidence at the trial. If the plea was bad, which was not the fact, the plaintiff below ought to have demurred to it. The House could not take notice of it as it was not in the bill of exceptions, nor noticed the errors assigned on the record. As a court of error their Lordships' attention was not called to the force of the pleas at all. The pleas were good. The traverse and the issue taken on that traverse was, therefore, good. The plaintiff was not possessed of the advowson, and he had no right to present in the manner and form alleged. It being argued that this fine would show the title to the advowson out of the plaintiff, his counsel contended that the fine was not admissible in evidence on that issue. The Court below held it was admissible. It was suggested that it was not receivable evidence unless specially pleaded, and that objection was undoubtedly entitled to great consideration. But the plaintiffs in error contended that it was necessary to plead it; and, moreover, it could not be pleaded. If a fine was relied on as an estoppel between the parties, it should be pleaded; and if recourse was had to this fine to show that the Earls of *Clanricarde* (who were parties or consorsors of the fine) were estopped by it in the literal meaning of the word, it ought to have been pleaded. But the question was whether it was admissible evidence to show that the Earl of *Clanricarde* parted with the advowson, if

had it; for the words of the fine included the advowson, and therefore the fine would pass the manor, if it belonged to the Earl of *Clanricarde*, and the advowson appendant to it, out of the house of *Clanricarde*. In that sense the fine could not have been pleaded. The declaration stated that the advowson was in several Earls of *Clanricarde*, whose descent was set out and the title traced down to the present plaintiff. Any special allegation—any allegation of new matter in pleading would have admitted the fact stated in the declaration. The defendants below could not have alleged any new matter merely consistent with the fact stated in the declaration, but it would have been necessary to confess the declaration before they could have pleaded any special matter. The pleading, therefore, of the fine would have been bad pleading; it would have been alleging a matter inconsistent with the title of the plaintiff, but not the confession and avoidance of that title, nor would it have been a traverse. The proper course of pleading in such a case was to deny the title of the plaintiff, and then any act or matter which showed that the plaintiff had not a title was properly receivable in evidence under the traverse of that title. The authorities on this point were collected in *Arlett v. Ellis* (o); and in *Murgatroid v. Law* (p), one of the cases there cited, the defendant pleaded in bar that he was seised in fee of his close, and that all those whose estates he had therein had been accustomed to take the water for the convenient watering of their cattle in the close. Upon general demurrer the plea was adjudged ill, because the defendant had neither confessed and avoided, nor traversed the matter alleged in the declaration; but it

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(o) 7 Barn. & Cress. 346.

(p) Carthew, 116.

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was said if he had pleaded the general issue, the stated in the special plea would have been an answer to the action. So the parties here having reversed the right of the plaintiff to present any evidence showing that the plaintiff had not a right to present was admissible under that issue. The inducement this traverse could not be traversed; it was immaterial; the only effect and object in having the record was, that if there was any question of law, the opinion of the Court might be taken once on the law, stated in the inducement, but the fact submitted to the jury was on the traverse. The Court looked to that, and both parties must be governed by it. The traverse was, that the plaintiff had a right to this advowson, and if anything were proved that the plaintiff had no right to this advowson, it was properly receivable in evidence. So in an action on a deed, and instead of pleading *factum*, defendant pleaded *nil debet*, which was a plea on special demurrer. If the parties joined issue the plaintiff might prove the whole allegation in the declaration. Though the plaintiff need not have taken issue upon it, being a bad plea, yet if he joined issue he was bound to prove the whole allegation, and that plea of *nil debet* the defendant might give evidence anything, showing that the plaintiff had no right of action against him. Now, on this plea the bishop and the pleas of the clerk, which were the fact of possession and the right of the plaintiff to the fine was properly receivable in evidence. Those pleas traverse was taken on the ownership of the advowson, and the right to present. It was contended that the donor of the fine, the then Earl of Cardigan, had done nothing afterwards on it, and that the plaintiff below showed the Earls of Clanricarde.

were treated as owners of the advowson afterwards, it might be presumed that the conusee of the fine became a trustee for that family. The facts stated on the fine led to the opposite inference. Was it not a question for the jury, and should it not have been left to them, whether the conusor was trustee for the Earl of *Clanricarde*? whether they would presume a conveyance from the trustee of that to which the fine proceeded to relate? The judges below told the jury that the fine was no bar to the plaintiff's right to recover on the issues, but in that view they should not have received the fine in evidence when tendered by the defendant's counsel, and objected to on behalf of the plaintiff; they erred in telling the jury that it had no weight in the case. Whether it had any or no weight, whether it might be supposed that the conusees were trustees for the Earl of *Clanricarde*, were questions for the jury, but no such question was submitted to them; the judges took away the fine entirely from the consideration of the jury; that was one of the points in which their directions were excepted to, and on that ground also the plaintiffs in error were entitled to judgment on the bill of exceptions.

On all the points taken before the Court below on the bill of exceptions, it was submitted that the plaintiffs in error were entitled to their Lordships' judgment, and the cause ought to be sent again to be tried, when the evidence might be properly sifted, and that which was not evidence should not be presented to the jury, and that which was legitimate evidence might be presented to them with all its proper weight and authority.

Lord *Brougham* suggested to the counsel for the defendant in error, that it was competent to them to reply to any new topic introduced by Sir *W. Follett*.

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Sir *Frederick Pollock* confined himself to a few observations on the Acts of Parliament and the cases referred to, for the first time, by Sir *William Follett*, adding, that he would not trouble their Lordships further, as he conceived his learned friend Mr. *Miller* had embraced all the points of the case in his argument.

Lord *Brougham* :—Yes, he argued the case with the greatest ability; and it must be a great satisfaction, not only to their Lordships, but also to the learned Judges present, that a case of such considerable importance, not only with respect to the interests involved in it, but with respect to the points of law raised in it, has been argued with so much ability and learning on both sides.

It now becomes my duty to state to your Lordships the questions which it appears to me to be expedient you should propose to the learned Judges who have assisted your Lordships in this case, for the purpose of getting the benefit of their learning and experience in dealing with the points made at the Bar. There may be said to be three great branches of the case, to all of which I propose to direct the attention of the learned Judges.

The first and most important question relates to the admissibility of certain evidence under the issues here joined. Although there were many pleas, and a great number of issues joined on them, the jury was discharged without finding any verdict except as to the issues upon the fifth count of the declaration. The second branch of the case relates to the power, force, and effect of a certain statute; and the third, to the power, force, and effect of a certain fine. If any other point has escaped me in this enumeration, I

should wish to have it suggested by the learned counsel before the questions are finally settled for the learned Judges, for it is very material that no point should be left out. As it is impossible to anticipate what may be the result of the consultation of the learned Judges, or of the opinions subsequently formed by your Lordships on the result of that consultation, on the first question, as to the admissibility of certain evidence, it becomes necessary to request the attention of the House, and of the learned Judges, in the first instance, to all those three branches, because, although undoubtedly if the first should be decided in one way, the others would cease to be material, and the whole case would be disposed of for the present; yet, if the first question should be decided another way, the other questions must necessarily arise in succession.

The first of these questions is, as to the admissibility in evidence of the deed of grant from a Lord *Clanricarde*, of the next presentation on the next avoidance of the living, to an individual who presented a clerk to the then bishop, which clerk the bishop, it is said, instituted. Ought that deed to have been admitted in evidence, regard being had to that which forms the principal ground of objection to its reception, viz. the defective proof of its custody? Perhaps a difficulty might arise even if the evidence of custody were perfect, as to the binding nature of that deed on the present bishop. But, however, on that branch the principal point is the custody. I have an inclination of opinion upon that subject. I have not often in my experience on these questions, which is very much inferior to that of many of the learned persons assisting your Lordships, but I do not recollect to have observed any case in which there was so scanty a

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holding a royal visitation at Dublin, 22d June, 15 James 1, appointing commissioners to inquire as to church livings, and an entry in the royal visitation book for the year 1615, finding the value of the rectory and vicarage of *Rathweir*, otherwise *Killucan*, and that the Earl of *Clanricarde* was patron thereof; *An entry* in the royal visitation book of the year 1637, showing that *Edward Donnellan* was then rector and vicar of the said rectory and vicarage; *A commission* of the commonwealth, dated 19th of August 1653, directing an inquiry as to all manors, rectories, and other hereditaments, and who owned or claimed the same on the 23d of October 1641, and the return thereto, dated November 7, 1653, finding that the parsonage and vicarage of *Killucan* was on that day (23d October 1641) held by *Edward Donnellan*, clerk, on the presentation of the Earl of *Clanricarde*, patron thereof; *A king's letter*, dated the 16th of July 1661, 13 Charles 2, ordering that *Rickard*, sixth Earl of *Clanricarde*, should be established in quiet possession of all hereditaments which should have come to him by descent; *Letters patent*, dated the 19th of December, 33 Charles 2, reciting the conformity of *Rickard Lord Dunkellyn*, eldest son of *William*, the seventh Earl of *Clanricarde*, to the protestant religion, and granting to the said Lord *Dunkellyn* and his heirs, continuing protestants, all such advowsons and rights of patronage as had belonged to *Ulick*, Marquis and Earl of *Clanricarde*, *Rickard* late Earl and *William* then Earl of *Clanricarde*, or any person claiming under them, either in gross or appendant; *An entry* in the visitation book of the diocese of *Meath*, whereby it appeared that in the year 1673, one *William Barry* was rector and vicar of the church of *Rathweir*; *An enrolment* of letters patent, dated the 20th of January, 7 *William* 3, pre-

for discovery, being filed against parties to compel them to produce cases which they had laid before their own counsel. The practice has been subjected to many observations at your Lordships' bar, and it is, perhaps, to be lamented, that there ever was such a decision pronounced or affirmed by this House, which is the court of last resort, as the decision in that case of *Radcliffe v. Fursman* (*q*), the effect of which is, that when a man has laid before his counsel a confidential statement for the purpose of enabling himself to prosecute his claim or defend his possessions, another person in another suit, provided he makes a case for a decree generally, is enabled to extract from that party a case so prepared and laid confidentially before his counsel. It is, perhaps, much to be lamented that that should be law, but the law is inveterate; it is sanctioned by a decision solemnly pronounced by this House in that case; it has always been acted upon since, and acted on to a great extent, until the three late cases of *Hughes v. Biddulph* (*r*), *Vent v. Pacey* (*s*), and *Bolton v. The Corporation of Liverpool* (*t*). In all these cases it has been acted on less rigorously, and the right of the party has been confined within narrower bounds than ever was done in former cases.

A question for consideration also might be raised, whether the case, if the production of it be compelled, or if it be admitted, is to be accompanied with explanation, which may be given by the answer, or whether it can ever be used before a jury without the answer being read. Then it is to be considered, whether that qualification does not differ from this case, and even now exclude it. If, acting on the advice of the learned

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(*q*) 2 Bro. P. C. 514.
(*r*) 4 Russ. 190.

(*s*) 4 Russ. 193.
(*t*) 1 Myl. & K. 88.

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of *Clanricarde*, in trustees, discharged of certain trusts, and vesting in *Henry*, then Lord Dunkellyn, eldest son of the said *John Smith*, Earl of Clanricarde, a power to charge upon certain estates and advowsons therein mentioned (including the advowson of Killucan), a jointure of 2,000 *l.* for any wife he might marry, and to create a term of five hundred years in the said estates for securing the same; and a memorial of an indenture of settlement, made the 16th of March 1785, on the marriage of the said Lord Dunkellyn with *Urania Pawlett*, whereby a jointure of 2000 *l.* was charged on the said estates and advowsons, and a term of five hundred years was created and vested in *H. P. Wyndham*, since deceased, and the plaintiff, upon trust, to secure the said jointure.

The Plaintiff further, in support of his case, produced in evidence two documents, the admissibility of which is one of the questions in this appeal; one of these was a parchment writing bearing date the 28th of March 1637, and purporting to be a grant by *Ulick*, fifth Earl of Clanricarde, to *Dr. Edward Donnellan*, of the then next avoidance of the rectory and vicarage of *Rathweir* otherwise *Killucan*. The other purported to be a case, stated for the opinion of counsel on the part of the said *Anthony Dopping*, Bishop of *Meath*, the 28th of February 1695, wherein it was (among other things) stated, on the part of the said Bishop, that in the year 1637, *Ulick*, Earl of Clanricarde, granted to *Dr. Donnellan*, incumbent of *Rathweir*, his executors and administrators, the next presentation to the rectory and vicarage of *Rathweir*, dated the 28th of March 1637; that in 1642 both rectory and vicarage being void by the death of *Dr. Donnellan*, his widow and executrix presented, *pro hac vice tantum*, William Barry to both, who was in-

same question as with respect to the deed. With respect to the fine levied of the manor and advowson, the question resolves itself into three: First, whether or not the fine (stating the circumstances of the fine levied by the party whose estate the present party, the defendant in error, the plaintiff in the *quare impedit* has), whether the fine being so levied is admissible in evidence upon the issues raised on the pleas to the fifth count, in this state of the record. In consequence of the argument in reply by the counsel for the plaintiffs in error, the second question which it is material to put is, whether, if receivable, it ought not to be left to the jury to say whether the effect and force of that fine was a bar to the action; and the third question, supposing it is on the record, is, whether the force and effect of that fine is sufficient to bar the action.

These questions, the first two on the admissibility; the second two on the force of the statute; and the last three on the fine levied, will, as far as I am advised, exhaust the inquiry (x).

Lord Chief Justice *Tindal* delivered the unanimous opinion of the judges, upon the said questions, as amended:—"The first and second questions proposed by your Lordships to his Majesty's judges are these:—In *quare impedit* to recover the presentation to the church of K., the advowson whereof is claimed to be part of the temporalities of the Bishop of M., a deed was offered in evidence, purporting to be brought from the custody particularly described

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(x) Some of the questions submitted to the learned Judges were, upon their suggestion, afterwards altered by the House, and all of them, so altered and corrected, are stated by Lord Chief Justice *Tindal*.

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particularly one of the year 1616, by *George*, Bishop of *Meath*; that there were in the same room several other papers relating to the See of *Meath*, several of which were in the same parcel which he brought away; and that the said two documents produced by the said *Anthony Dopping* above mentioned, were in the said parcel of papers; that he was at *Lowton House* from two o'clock on Monday to two o'clock on the following day; that he went there on the part of the said Mr. *Sirr* and Mr. *John Darcy*, and that he never informed the said Bishop of *Meath* (one of the defendants below), that the said papers or books, or any of them, were at *Lowton House*, but that he showed copies of some of them to the plaintiff's agent, and told him the said papers were at *Lowton House*. The Rev. *George Brabazon* deposed, that he is registrar in the registry office of the Diocese of *Meath*, at *Navan*, and that there is no registry of ecclesiastical or other records, (except one roll), anterior to the year 1717; that the said registry office is the proper place where the visitation books of the diocese and entry of all presentations, admissions, institutions and collations to ecclesiastical benefices within said diocese, and various other papers and records relative to the said diocese, and the several ecclesiastical benefices within the same, should be kept, but that such are not to be found and are not preserved in the said registry office, relating to a period anterior to 1717, the reason of which circumstance he was unable to explain.

The counsel for the defendants at the trial, did not cross-examine those witnesses, but objected to the reception of these two documents in evidence; but the learned Judges overruled, the objection, declaring their opinions, that they were admissible, to which holding the defendants' counsel tendered a bill of exceptions.

pedit could have compelled the bishop, the supposed defendant, to produce in evidence the case which had been stated for the opinion of counsel by his predecessor, either by any proceeding in a court of equity or otherwise; or whether the counsel or attorney who drew up the statements contained in that case, could have been compelled to disclose such statements, either as against their client or the successor of their client. The present inquiry stands unembarrassed with the consideration of that question; for the case stated for counsel has actually come into the possession of the plaintiff in the *quare impedit*, and the plaintiff himself produces it at the trial of the cause as part of his evidence; and the question is the same as if a case, with the opinion of counsel, which one party was not bound to produce, had found its way, by accident or otherwise, into the hands of the other party. Upon this view of the subject, it appears to us that the only considerations that arise upon the production of the case are two; first, whether the custody in which it is found is such as to stamp it with authenticity as a genuine document; and, secondly, if it is to be taken to be genuine, whether the statements of the facts contained in it are admissible against the interests of the successor of the former bishop who made, or caused to be made, the statements contained in the case.

The first, and indeed the principal question is, whether this document was found in such custody, and under such circumstances attending the finding of it, as to give it authenticity, as being a case really stated by the authority and on the behalf of a former bishop of the same see.

Now, before we consider the facts relating to the finding of the case as stated in the bill of exceptions,

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to which we are referred, we cannot but observe that the statement itself in the bill of exceptions is very loose and inaccurate. But we think, in construing the statement contained in a bill of exceptions, we are to consider ourselves placed in a situation analogous to that of a jury ; and that, like a jury, we are bound to make every legal presumption from the facts stated, and every reasonable inference which those facts will bear. Supposing facts, therefore, are stated by the plaintiff's witnesses in an uncertain or ambiguous manner, as the defendant's counsel have neglected, by cross-examination, of which they had the opportunity, to render the statement more clear and certain, and to remove any ambiguity of expression, it is not competent for the defendant below, in this advanced stage of the proceedings, to make his stand upon the looseness and ambiguity of the testimony, of which he is, to a considerable extent, himself the cause. In such case the judges can only, as judges of the fact, and with the eyes of common men, endeavour to discover the truth through the vagueness and uncertainty of the statement, and then only to act upon it where they can feel a solid foundation on which they can rely.

This observation will dispose of much of the objection which has been made in the course of the argument against the testimony of the witnesses who depose to the time, place, and manner of the finding of the case and of the grant ; and looking at the statements in the bill of exceptions, we think the fair result of the evidence is, that both the documents to which exceptions have been taken were found, tied up together with other papers relating to the see, in a house called *Lowton House*, which was the family mansion-house of the *Doppings* ; that is, the mansion-

house of the family of which *Anthony Dopping*, formerly Bishop of *Meath*, was one member, and of which the witness who gave the testimony was another; that this house was occupied by a member of the *Dopping* family at the time the papers were found there; and, lastly, that it was the house in which the *Dopping* family papers were kept. There is not one of these facts, vague as they appear at present, which might not have been cleared from all ambiguity by a very little cross-examination, if they are founded in truth; and, on the other hand, not one which would have stood the test of such cross-examination if untrue. Other parts of the bill of exceptions corroborate and confirm the result of the evidence as above stated. That there was an *Anthony Dopping* who had been Bishop of *Meath*; that he had some family, and that he had collated his son to the living now in dispute, is proved by documentary evidence set forth in the bill of exceptions, which documentary evidence was contemporaneous with the fact, and cannot mislead. Again, as the original documents do not appear before the judges on a bill of exceptions, but the transcript only is set out upon the record, it is the proper and necessary intendment, that there is nothing upon the face or in the condition of the documents themselves which excites suspicion as to their genuineness; for in this stage of the proceedings credit must be given to the Court below, that they would not have allowed the documents to be read if they had borne upon their face, or in their condition, any evidence against their admissibility. The result of the evidence, upon the bill of exceptions, we think is this, that these documents were found in a place in which, and under the care of persons with whom, papers of Bishop *Dopping* might naturally and reason-

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ably be expected to be found; and that is precisely the custody which gives authenticity to documents found within it; for it is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody, there never would be any question as to their authenticity; but it is when documents are found in other than the proper place of deposit that the investigation commences, whether it was reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious, that whilst there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable, though differing in degree, some being more so, some less; and in those cases, the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine.

That such is the character and description of the custody which is held sufficiently genuine to render a document admissible appears from all the cases. On the one hand, old grants to abbeys have been rejected as evidence of private rights, where the possession of them has appeared altogether unconnected with the persons who had an interest in the estate. Thus, a manuscript found in the Herald's Office enumerating the possessions of the dissolved monastery of *Tutbury*, *Lygon v. Strutt* (y); a manuscript found in the *Bodleian Library* at *Oxford*, *Michell v. Rabbetts*, cited in *Swinnerton v. Marquis of Stafford* (z); an old grant to a priory brought from

(y) 2 Anstr. 601.

(z) 3 Taunt. 91.

the *Cottonian* MSS. in the *British Museum*, *Swinerton v. Marquis of Stafford*; were held to be inadmissible, the possession of the documents being unconnected with the interests in the property. On the other hand, an old chartulary of the dissolved abbey of *Glastonbury* was held to be admissible, because found in the possession of the owner of part of the abbey lands, though not of the principal proprietor, *Bullen v. Michel* (a). That was not the proper custody which, as Lord *Redesdale* observed (b), would have been the Augmentation Office; and as between the different proprietors of the abbey lands, it might have been more reasonably expected to have been deposited with the largest; but it was, as the Court of Exchequer argued, a place of custody where it might be reasonably expected to be found. So also in the case of *Jones v. Waller* (c), the collector's book would have been as well authenticated if produced from the custody of the executor of the incumbent, or his successor, as from the hands of the successor of the collector. The case of *Bertie v. Beaumont* (d) is to the same effect.

Upon this principle we think the case stated for the opinion of counsel, purporting to be stated on the part of Bishop *Dopping*, and found in the place and in the custody before described, was admissible in evidence. It was a document which related to the private interests of the Bishop at the time it was stated; for it bears date in 1695, about which time it appears, from other facts found, that *Barry*, the late incumbent, was dead, and that before 1697 Bishop *Dopping* had collated his own son. It related, therefore, to a real trans-

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(a) 2 Price, 399.

(b) 4 Dow, 321.

(c) 2 Gwill. 346.

(d) 2 Price, 303.

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be a grant by *Ulick*, fifth Earl, to *Dr. Edward Donnellan*, of the next avoidance, and the paper writing, purporting to be a case stated in 1695 on behalf of *Anthony*, Bishop of *Meath*, for the opinion of counsel, were improperly admitted in evidence.

That the jury were misdirected as to the operation of the Act 10 Henry 7, on the grant of the advowson by King *Edward* 4, to the see of *Meath*; and also as to the effect of the fine of Trinity term, 1 Jac. 2.

The House of Lords, considering the case to be of such a nature as to require the assistance of the Judges, made an order for their attendance (*b*).

The *Attorney-General* (Sir *William Follett* and Mr. *Byles* were with him) for the plaintiffs in error.

In the Court below, the plaintiffs in error relied on the grant of the advowson of the church of *Kil-lucan* by King *Edward* 4 to *William Sherwood*, Bishop of *Meath*, and his successors in that see, whereby the advowson was disappended from the manor of *Rath-weir*. They further relied, in bar of the action, on the fine levied of the advowson to *John Brown* and others, 1 *James* 2, by *William*, seventh Earl of *Clanricarde*, conveying it away from him and his heirs, under whom the defendant in error claimed it. He, on the other hand, insisted that the grant by *Edward* 4 was annulled by an alleged Act of Parliament of the tenth year of King *Henry* 7, that by that Act the advowson was resumed into the king's hands and re-appended to the manor, and that the manor and advowson were afterwards granted in fee, by King *James* 1, to

(*b*) The Judges present were Lord Chief Justice Tindal, Justices Park, Gaselee, Littledale, Williams, Patteson, and Coleridge; Barons Parke, Bolland, and Gurney. The Great Seal being in commission, Lord Shaftesbury presided; Lord Lyndhurst and Lord Brougham were present.

supposed to have had any knowledge of the See. The case, indeed, is dated in 1695; the grant, which is set out in it, is dated in 1635; the presentation under the grant, in 1642; and the induction in 1660. Undoubtedly, if by knowledge is meant a personal knowledge of the facts, it must be held to have been wanting in the present case. But the facts stated were all facts that are evidenced by written documents; the grant itself accompanied the case, being bound up in the same parcel; the presentation and induction are only to be proved by written entries, which were peculiarly within his reach. With such, the best means of knowledge, therefore, we think the statement by him, or by his attorney, of a fact in the case, directly against his own interest at the time the case was stated, was not only an admission against him, but against his successors, who stood in the same situation.

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So much having been said about the case, it is scarcely necessary to refer to the grant; it is set forth in the case, and thereby authenticated; and this alone would make it producible. But it is in itself a grant of great antiquity, and, we are bound to assume, without any apparent infirmity or defect on the face of it, to render it unworthy of credit.

Upon the whole, therefore, our opinion is, that both the one document and the other were admissible.

Your Lordships next direct the attention of the Judges to an Act of Parliament passed at a Parliament held at *Drogheda*, in the tenth year of the reign of *Henry 7* (set out in the appendix to the bill of exceptions, to which we are referred), and to a certain grant of the advowson of *Rathweir* by King *Edward 4*, whereof he was seised in the same right as of the manor of *Rathweir*, in the said appendix

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books and other papers belonging to the see of *Meath* in that room, several of which, together with these two documents, were in the parcel which he brought away. To give the greater appearance of authenticity to these documents, the plaintiff below produced at the trial the Rev. *Mr. Brabazon*, who said he was registrar of the registry-office of the diocese of *Meath*, and that his office was the proper place for the visitation books, and for the entry of all presentations, admissions, institutions, and collations to ecclesiastical benefices within the same, but no such entry, nor any ecclesiastical or other records except one roll, were to be found in that office, relating to any period anterior to the year 1717. That was all the evidence that was given to authenticate these documents. There was no proof that *Lowton House* was the family mansion of Bishop *Dopping's* descendants; no proof that *Mr. Dopping*, the witness, or *Mrs. Dopping*, the elderly lady who was said to inhabit that mansion, was connected with the bishop of that name; there was no pedigree, and no proof by will or administration of any such connexion. Sir *William Beetham* was instructed, on the part of the friends of the plaintiff below, to make a search; he went to that house in company with *Mr. Sirr*, and brought away and gave the parcel of papers to *Mr. Sirr*, who gave them to *Mr. Darcy*, who gave them to *Mr. Dopping*, by whom these documents were produced at the trial. There would be no protection against fraud in courts of justice, if documents, the custody of which rested on such vague proof as was given by these witnesses, were to be held admissible in evidence.—[Lord *Brougham*: If parties chose not to cross-examine witnesses, but leave the evidence vague and loose for the purpose of taking objections afterwards, it was their own fault, but it is

was the uncle of the king. As, however, the term used in the Act is the plural term, "progenitors," more than one king must have been intended, and it seems not possible to extend it beyond one without allowing it to be synonymous with the word "predecessors," a word with which it is often put in apposition in statutes of the same reign, as in 11 *Hen.* 7, c. 4, and also c. 8. And again, the statute referred to by the counsel for the plaintiff in error, as set out in *Plowden's Reports*, 226, wherein *Henry* 4, *Henry* 5, and *Henry* 6 are called the king's noble progenitors, affords itself a proof that the word is used in a wider sense; for those kings were his predecessors, but not his progenitors. Again, the word must either comprise all his predecessors, Kings of *England*, or his predecessors who were of the house of *Lancaster* only; but it would lead to an unreasonable result if the word is confined to the latter only; for in that case all the grants made by the house of *Lancaster* to their friends would be annulled, and those made by the house of *York* to the enemies of the house of *Lancaster* would be confirmed. And when the object of the statute is considered, which was that of bringing money into the king's coffers by the annulling of all former improvident grants of the Crown, there can be no reason to doubt that it was intended to comprise within it, the grants made by former Kings of *England*, whether of the one house or of the other.

As to the objection secondly above urged, that the statute extends to grants only of such property whereof the Crown was seised *jure coronæ*, no such distinction appears upon the face of the statute itself. The king (*Edward* 4) was equally seised in fee, whether the advowson belonged to him *jure privato* or *jure coronæ*. "Advowson of churches" are within

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former presentation without the grant. At all events the bishop's family would properly have the custody of the case, if not of the grant. Then if the house in question is to be considered the family house of the bishop and of his descendants, that might be conclusive upon the question of custody, if such case is evidence against the successors.]—[Lord *Lyndhurst*: Though the objection to the grant may be sustained, that would be good for nothing without the case. If the case is rightly in the bishop's custody, that is connected with the grant, for the case refers to the grant. The objection as to custody does not seem to apply to the case.]—Independently of the objection to the custody, the grant purporting to have been made by *Ulick*, fifth Earl of *Clanricarde*, was no evidence of the seisin of *Richard*, fourth earl. A grant of the next avoidance was not, *per se*, any evidence of seisin in any one, and there was no admissible evidence of presentation under this grant.

There was another and a stronger objection, founded on the policy of the law, to the production of the alleged case against the successor of the bishop, by whom the case purported to be stated. The case could not be admitted in evidence against bishop *Dopping*.—[Lord *Brougham*: He would be compelled by order of the Court of Chancery, on a bill of discovery, to produce it. Harsh as the practice may seem, it is so decided in Chancery, and in this House also; *Radcliffe v. Fursman* (i).]—[Lord *Lyndhurst*: And so it is in *Preston v. Carr* (k), in the Court of *Exchequer*.]—The doctrine was laid down in the case of *Bolton v. The Corporation of Liverpool* (l). There the subject of dispute was a matter of public right,

(i) 2 Bro. P. C. 514. Toml. ed.

(k) 1 You. & Jerv. 175.

(l) 3 Sim. 467, and on appeal, 1 Myl. & K. 88.

gate, we think it sufficient to observe, that the words are large enough to extend to both,—the very expression of “any person or persons, by whatever name or names they may be named,” pointing as well, or rather more expressly, to a body politic, which is known only by name, than to persons in their individual capacity; and if this were left in doubt, the exception annexed to the Act, of the grant to the Archbishop of *Dublin*, and to the corporation of the Bailiffs of *Dundalk*, shows, that if not specially excepted, bodies corporate, both sole and aggregate, were understood to be included in the operation of the Act.

The only remaining objection is that which limits the operation of the statute to grants under the Great Seal of *England* or *Ireland*. Upon this head of inquiry the plaintiffs in error object that the grant in question does not appear to have been made under the Great Seal, either of the one or the other kingdom. The argument appears to stand thus: that, from the facts stated in the bill of exceptions, *Edward 4* must be taken to have been seised of this property as Earl of *March*; that by the title deduced in the inquisition, 23 *Henry 8*, it appears that the *March* property was always kept by *Edward 4* distinct from property held *jure coronæ*, a course of descent being in that inquisition traced from him to *Henry 8*, quite inconsistent with that of Crown land. It is inferred, therefore, *à priori*, that *Edward 4*, granting in the right of his Earldom of *March*, would grant under some seal belonging to him as such; at all events, neither by the Great Seal, nor by Act of Parliament; that nothing appears on the face of the grant to contradict this presumption, the letters not being stated to be patent, nor any seal now appearing, nor any circumstance from which it can be argued that the

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compelled. In the present case, there was no question of compulsory production. The document being produced by the plaintiff, the question was, whether it was admissible in evidence against the bishop's successor. The decisions in courts of equity show, that where a case has been laid before counsel, it is the inveterate practice of those courts, acted upon daily, that in any proceeding, except the suit actually pending, the defendant may be compelled, by bill of discovery, to produce the case laid by him confidentially before his counsel, but not the answer of the counsel, a rule apparently not very consistent. The exception of *lis mota* is confined to the suit pending, or in immediate contemplation. The documents ordered to be produced in a court of equity would be evidence in an action at law. Any objection to them as evidence there would be a reason for refusing their production in equity. *Preston v. Carr* was a strong case. *Greenough v. Gaskell*, before me in Chancery, was a bill charging a solicitor with a participation in a fraud, in the course of proceedings on the part of his client, and I refused to compel him to produce entries in his books, and written communications received by him from his client relative to those proceedings. It may be difficult in principle to draw a distinction between what passes in the consultation room with the attorney and counsel upon a verbal consultation, which the client may be compelled to disclose, and the written opinion of the legal adviser upon a case, which is a written consultation. The question upon that point has not been pressed in courts of equity.]

The *Attorney-General* read the judgment in the case of *Greenough v. Gaskell*, and on the doctrines and principles there laid down he submitted that

with regard to the lands which descended to the King from the Duke of *York*, the Earl of *March*, and others of the King's ancestors, who never were kings." The land, therefore, of the Earldom would properly be passable by such form of grant only as would be used by the King in conveying property held *jure coronæ*. This is a well-known consequence, resulting not from the title of the property, but the dignity of the holder, in whom the body politic absorbs the body natural.

Whether, therefore, the property of the Earl of *March* were annexed to the Crown at the date of the grant in question, or not, seems not very material; for being at all events in the hands of the king for the time being, the legal presumption is, that it would for that time be granted as if it were held *jure coronæ*. The argument, therefore, deduced from the title and course of descent traced by the inquisition, relating to the manor of *Rathweir* with its appurtenances, fails in its application, even if we could attach much weight, upon a question of fact, to a document which is manifestly inaccurate upon the bare inspection of it, omitting, as it does, all mention of the two sons of *Edward 4*, from the eldest of whom, *Edward 5*, and not from the father, the daughters must have inherited. But the difficulty still remains as to the recital in the *English* statute, 4 *Hen. 7*, cap. 14. If this had been an inquiry as to property in *England*, that recital would undoubtedly have presented a difficulty almost insurmountable; for a fact is stated therein, and a mischief resulting from it, for redress of which the statute is made. Whatever legal presumptions there may be to the contrary, the recital affords stronger evidence that the irregular practice complained of in the statute had actually taken place.

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facts, according to the rules of evidence, although the facts happened before his birth. In this case it seems he saw the person instituted in actual possession of the living.]

The *Attorney-general*:—The next question arose on the grant by King Edward 4 to *William Sherwood*, Bishop of *Meath*, and his successors, and on the effect of the alleged Act of 10 Henry 7. It was admitted that the grant was valid, and would enure to the successors of Bishop *Sherwood*, if the Act had not resumed all grants into the hands of *Henry 7*. The Act was set out in the bill of exceptions, but no one knew where it was found. The House would perhaps take cognizance of it, and authenticate it by sending for the roll, and thereby ascertain whether such an Act ever existed; and if it did, whether it was still existing unrepealed. Assuming that the Act was genuine, it could not operate as a resumption of the grant to Bishop *Sherwood*; it applied to grants under the Great Seal, but the grant by *Edward 4* was in his private capacity, and not under the Great Seal; and the thing granted was not part of the possessions of the Crown. But suppose the Act did operate as a resumption of the grant of the advowson, then it could not pass afterwards as an advowson appendant to the manor of *Rathweir* to *John King*, from whom the Earl of *Clanricarde* claimed to derive. The grant had disappended the advowson from the manor, and it could never again become appendant; the appendancy was destroyed, and the advowson, from the time it was granted by itself, became an advowson in gross for ever (1 *Comyn's Digest*, Tit. App. (D), p. 532.) (r). The only exception to the rule there laid down was, when the Act disappending the advowson was unlawful.

(r) 3d ed. by Kidd. See also 2 Mod. 1.

Upon the question next proposed to us, whether by the effect of such resumption of the grant, the advowson became re-appended to the manor, which still remained in the hands of the Crown, we think the words of the statute itself give the answer, without entering into the discussion of the various authorities which have been cited in the argument before your Lordships. Nothing but the grant of *Edward 4* had disappended the advowson from the manor. The Resumption Act "annuls, makes void, and of none effect in the law," the grant itself. This is not the case of a Parliamentary reconveyance, but the cause of disappendancy ceases from the time of passing the Act, as if it had never been, and with it all effect of the grant from that time must necessarily also cease. It was urged at your Lordships' bar, that the consequences would be monstrous if the grant were to be held altogether void; that it would avoid and render illegal all intermediate acts founded on a grant legal in itself when made; but we are far from thinking the consequences above stated would follow; a grant which is to be deemed void in law and as if it had never been, from a certain day, may yet be regarded as having had existence at a former period, for the purpose only of preventing parties, who have dealt with the property, from being treated as trespassers or wrong doers, and protecting acts done at an intermediate time.

For the reasons, therefore, above given, we think the advowson became re-appended to the manor by the legal operation of the statute above referred to.

Your Lordships, lastly, refer to the pleadings upon the fifth count of a *quare impedit* brought by *C.* against the Bishop of *M.*, and to the issues joined on those pleas; and after premising that on these issues a fine

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Edward 4 had been also desirous of keeping his title of Earl of *March* distinct from his title as king. *Henry 8* was stated in the bill of exceptions to have taken the manor, with its appurtenances, through his mother, as appeared by the inquisition.—[Lord *Brougham*: That inquisition does not state that the sisters died seised.]—It stated that the property descended on them as co-parceners, and *Elizabeth* having married *Henry 7*, and survived her sisters, who died without issue, the property went to *Henry 7*, and after his death to *Henry 8*, in right of his mother. There was no doubt that the property belonged to those monarchs in their private capacity, and not *jure coronæ*. It never was in the Crown, and therefore could not have passed by grant of *James 1* to *John King*, under whom the Earls of *Clanricarde* claimed title.

The third question for determination was, the effect and operation of the fine levied of the advowson, by *William*, seventh Earl of *Clanricarde*, and which the Judges at the trial admitted in evidence on the part of the Bishop of *Meath*, but at the same time told the jury that it did not bar the plaintiff's right to recover in the action. The twelfth plea of the Bishop, and the seventh and eighth pleas of the Clerk, traversed the right of the plaintiff, and under those pleas the fine was properly admitted in evidence. It was not necessary to decide whether these were good pleas; by them the title of the Marquis of *Clanricarde* was denied, and it was shown by the fine that the person under whom he claimed alienated the advowson to *John Brown* and others. On that evidence, the Court below should have directed the jury to find that the plaintiff below had no right to present a clerk to this church; but the Judges directed the contrary, and the jury found accordingly.

otherwise *Rathweir*, in manner and form as the said plaintiff hath in his said fifth count alleged." That this traverse would have been held bad upon special demurrer there can be no doubt; but it is contended that, as the plaintiff has, instead of demurring, taken issue upon this traverse, he has waived any objection to it, and must be contented to admit under it all such evidence as by law it is calculated to receive. We must consider the point, therefore, as if this had been the only issue upon the record; and whether it would have been competent in that case to the defendants to give in evidence the fine by *William*, the seventh earl, and *Hester* his wife, is the question before us.

No authority can be found in the books which will throw any light on the question, for no instance can be brought forward where any parties in a *quare impedit* have proceeded to trial on such an issue. If the precedents given in *Mallory* on *quare impedit*, and the more numerous precedents to which he has referred, from the best books of entries, are consulted, it will be found that, with scarcely an exception, all of them contain, at the conclusion of the count, the allegation which is found in this, viz., "whereby the plaintiff became possessed of the advowson," or "of the right to present;" and yet in no single instance is there any traverse of that allegation. What evidence, therefore, may or may not be admitted under the traverse must depend upon principle and analogy to other cases, and cannot be governed by any direct authority. The first inquiry is, to what allegation does the traverse relate? The plaintiff, having in his fifth count distinctly alleged the death of Mr. *Windham*, who had been shown to be joint-tenant with the plaintiff of a certain term of years in this advowson, proceeds to allege "whereupon and whereby the

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Bishop *Dopping*, both found in the family mansion of the *Doppings*, were admissible in evidence for the plaintiff below, under the circumstances of their production. The grant would, undoubtedly, be of greater importance if it had been brought from the diocesan registry; but if it is a valid grant, it was not necessary that it should be brought from the *best* custody, it was sufficient if it came out of *proper* custody, in which case ancient deeds prove themselves. The combined result of the testimony of the witnesses relating to the finding of these documents was, that no ecclesiastical records of the see of *Meath* were to be found in the diocesan registry, anterior to the year 1717. If any such documents existed at all, they were to be sought for in some other repository. Absence from the registry was no ground to impeach their validity. Several of those records, of date anterior to 1717, were found in *Lowton House*, which is admitted to be the family residence of the *Dopping* family, the descendants of *Anthony Dopping*, a former Bishop of *Meath*. If the ecclesiastical records of his time were not in the public registry, where some, at least, of those documents, ought to have been deposited, then *Lowton House*, the place in which they were discovered, must, under the circumstances, be regarded as the diocesan registry during the time *Anthony Dopping* was bishop. The documents in question were found in that house, among other records of the see of *Meath*; and the grant of the next avoidance was found with documents in the custody in which it ought to have been. That grant was originally given to the grantee for the purpose of being delivered to the bishop of the diocese, when the avoidance of the church, the occasion for using it, should happen. That document could not pro-

effect of a general denial of each link in the chain of the title, if, besides compelling the plaintiff to prove them, and bringing his own witnesses to contest the truth of its existence, he might prove affirmatively a title in another person, what is that in effect but giving to this anomalous and unheard of traverse, the double force of a denial of all the steps of the title, and at the same time a confession of the existence of the title, but an avoidance of its effect.

In the present case there is only one allegation in the count, to which the fine could by possibility apply, and that is the allegation which, after stating *William* the seventh earl, to have been seised in fee tail of the advowson in gross, by virtue of letters patent and of an Act of Parliament, and that he continued so seised, avers that "upon his death, the advowson descended upon *Richard* the eighth earl, as his son and heir in tail male." And we hold, admitting the traverse to amount to a denial of the steps by which Earl *William's* title in fee tail is deduced, it will not allow the defendant to prove, by the fine, that such title ceased before his death; for if the title in fee, or fee tail, is once admitted or proved, in any person, it must be intended to continue in that person, without any allegation that it does, until the contrary is shown (*g*); and the cesser of that estate by conveyance or otherwise, is affirmative matter, which ought to be shown by a special plea on the other side. We, therefore, think ourselves well warranted in the conclusion, that the fine was not admissible under the issue above considered.

With respect to the traverse taken by the Clerk in his seventh plea, it is in these terms: "That it doth not belong to the plaintiff to present a fit person to the church in manner and form," &c. This is no

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many authorities. In *Doe v. Robson* (t) Lord *Ellenborough* said, "The ground on which entries in a deceased attorney's books, showing the time when a lease prepared for a client was executed, had been received, was that there was a total absence of interest in the persons making the entries to pervert the fact, and at the same time a competency in them to know it." So there was a competency in the person stating the facts contained in this case to have known them accurately ; and it was contrary to his interest to state them in the manner that he had done. In *Higham v. Ridgway* (u) the principle was clearly stated by Lord *Ellenborough*, and more fully by Justices *Le Blanc* and *Bayley*, to this effect, that where the Court was satisfied that the person whose written entry was offered in evidence had peculiar means of knowledge, and had no interest in falsifying the fact, but, on the contrary, had an interest against his written entry, that entry was clearly evidence. The same principle of absence of interest to misrepresent, and competency to know the fact, was fully recognised in the case of *Bullen v. Michel* (x), in the Court of Exchequer, where Mr. Baron *Graham*, adverting to the chartulary of the abbey of *Glastonbury*, found in possession of Lord *Bath*, who was owner of some of the possessions of the abbey, although not situated in the parish in which the controversy about moduses arose, said he grounded his opinion that the document was properly admitted in evidence upon this simple rule, that an instrument of this sort, coming from a custody which gives it authenticity as a genuine document, and re-

(t) 15 East. 32, see p. 34.

(u) 10 East, 109, see pp. 119, 120, and 121.

(x) 2 Price, 399, see p. 413.

essor "to have his answer, and show and defend his right upon the matter." The plea, therefore, which sets out the title of the patron ought, in order to maintain it, to traverse the plaintiff's title so far as it is inconsistent with that of his own patron, and so far only; and in that sense the traverse in the 5th, 7th, and 8th pleas must be understood, if the pleas are good in substance; that is, it must be taken that the Clerk means not to set up the title of a stranger to both the litigant parties, which would cut down the title both of himself and of his patron, which the law does not permit him to do, but to affirm that the title to the advowson was in the Bishops of *Meath*, or some one under whom they claim, and not in Earl *Michael* as the plaintiff, at the times respectively mentioned in the 5th count, and referred to in the traverses contained in the 5th, 7th, and 8th pleas of the Clerk. In this mode of construing the traverses, it is clear that the fine which showed the title to be in third persons was not admissible in evidence under any of the issues joined in this record.

With respect to the second question lastly above proposed to us, viz. whether if the fine were received in evidence it ought to be left to the jury to say whether it barred the action of *quare impedit*, we all think that the legal effect of such fine as a bar to the action of *quare impedit* is a matter of law merely, and not in any way a matter of fact; and, consequently, the Judge who tried the cause should state to the jury whether in point of law the fine had that effect, or what other effect on the rights of the litigant parties, upon the general and acknowledged principle, "*ad questionem juris non respondent juratores.*"

In answer to the last question proposed to us, we all agree in opinion, that the fine did not, if properly

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original could not be found in the proper depository, which was destroyed by the great fire of London. In that case a copy was admitted; in this the original document was produced. Depositories of ecclesiastical records in Ireland had been subject to much spoliation. There was not, perhaps, an instance of a perfect registry in that kingdom, in consequence of the commotions that had from time to time afflicted the country, and led to the removal, suppression, or destruction of public documents. Bishop *Dopping* might have had personal knowledge of the facts which he undertook to state; there was not evidence of the date of his birth; at all events he possessed all necessary means for acquiring information on the subject. He had access to the ecclesiastical records then in existence, and he was in possession of the deed of grant of the next avoidance; he probably knew Mr. *Barry*, whose institution he stated in his case. It was to be presumed that he left no legitimate means untried to acquire for himself the most accurate information on the subject, when the avowed object of his inquiry was as to the practicability of conferring such valuable benefits on a member of his own family; for in that case, as in the present, the collatee of the bishop was his own son. As Bishop *Dopping* possessed the means of accurate knowledge on the subject, and as he had a direct interest in not representing the facts as they appeared stated in the case, the reception of it in evidence came precisely within the principle laid down by Lord *Ellenborough* and the most eminent judges in questions of this nature.

In answer to the argument against the power of one party in a cause to compel his adversary to produce a case stated for the opinion of counsel, it was not necessary to do more than refer to the nume-

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June 6.D'ARCY MAHON, Esq. and Others - - *Appellants.*JOHN IRWIN, Esq. - - - - - *Respondent.*

Where an appellant, after receiving indulgence from the House upon terms, fails to comply with the terms, or to appear on the day appointed for the hearing, his appeal will be dismissed with costs, upon motion, on behalf of the Respondent, without requiring him to present a petition for the purpose.

Practice.
Dismissing
Appeal.

THIS appeal being appointed for hearing this day (2d of May), Mr. *Lynch*, for the above-named Appellant, prayed for an adjournment, for the purpose of getting an appendix to the Appellant's case printed, if their Lordships were of opinion it was necessary to print it. The Appellant was ready to pay the Respondent the costs of the day. To dismiss the appeal, under the circumstances, would amount to a denial of justice.

Mr. *Pemberton*, with whom was Mr. *Crawford*, for the Respondent, said the Master's report in the cause contained twenty-nine findings, on which an order was made by the Court of Exchequer in Ireland, and that order was appealed from generally. The Appellant ought to specify the points on which he meant to insist by his appeal.

Mr. *Lynch* :—We will specify them, and we will pay the costs of the day. We ask one month to prepare the

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tions and their *successors*, was nevertheless held to extend to such corporations as had an absolute estate and authority, such as mayor and commonalty, dean and chapter, colleges, &c.: *Croft v. Howell* (i). Sole corporations were not included in that decision, not because the word "persons" was not sufficiently comprehensive, but because they had but a limited estate and authority, and their acts required the assent of third persons. This statute, however, of 10 Henry 7 was applicable to corporations sole and aggregate as well as to individuals. The words were "by whatever name or names they be named," by which was intended the designation of the grantees, and not merely their names and surnames. The statute used expressions applicable to all descriptions of persons, who could be seised under all former grants; it was not confined to such persons only as were capable of being seised in any particular way; it extended to all who could be seised in any possible way. The principle which ought to govern this case was, that the statute was made for the benefit of the King; its object was to increase the royal revenue at that period, when the King's resources were so much required in order to suppress the outrages by which the country was so severely afflicted, which outrages were adverted to in the preamble of the statute. The principle of construction was stated in *Com. Dig.*: "A statute made for the benefit of the king shall be construed most beneficially for him." (k) The same doctrine was recognised in the case of *Reniger v. Fogossa* (l). It was objected that this doctrine did not apply to advowsons, as they were not productive of income to the Crown. But the King's rent-books abounded with entries of rents reserved from spiritual

(i) Plowd. 538. (k) *Com. Dig. Tit. Parl. (R. 21.)* (l) Plowd. 11.

The *Lord Chancellor* observed, that as the Appellant had not complied with the terms imposed on him by the House, the appeal must be dismissed, with costs ; but it required time to consider the form in which the order should be drawn up.

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The following order and judgment was made :—
Whereas Tuesday last was appointed for hearing the cause upon the petition and appeal of *D'Arcy Mahon* and *Anne Honoria*, his wife, and of *William Irwin*, a minor, only son of the said *Anne Honoria*, by her late husband *William Phibbs Irwin*, &c., complaining of a decree of the Court of Exchequer in *Ireland* of the 6th of February 1835, and of an order of the said Court of the 19th of November 1835, and praying that the same might be reversed, &c., and also upon the answer of *John Irwin* and *Andrew Clarke O'Malley*, put in to the said appeal, &c. Counsel were accordingly called in ; and counsel appearing for the said Respondents, but none for the Appellants, and the Respondents' counsel having prayed an affirmance of the said decree and order with costs, and due consideration being had thereof, It is ordered and adjudged by the Lords, &c., that the said petition and appeal be and the same is hereby dismissed this House ; and it is further ordered that the Appellants do pay or cause to be paid to the Respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk-assistant.

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Co. Litt. 15 b. Before the statute of uses, if a person seised to the use of another became King, he would immediately hold the lands discharged as to the use, and that in consequence of his acquirement of the royal dignity. Chief Justice *Holt*, in the case of the *Queen v. Smith (o)*, said, "The King can have nothing in his natural capacity, if it be not in right of his Duchy, or an estate tail by the statute *de donis* ; for if the King purchase land to him and his heirs, he shall have it in his politic capacity, and wherever the King is said generally to be seised, it shall be intended a seisin *jure coronæ*." The inquisition here found that King *Edward 4* was seised, and on the authority of this case he was seised *jure coronæ* at the time of his death. Whatever therefore might have been the original right of King *Edward 4* to the manor of *Rathweir* and its dependencies, the moment he became King, he held it as King, and he could have granted it in no other manner than as King, and consequently, whether he was to be considered as holding *jure coronæ* or *jure privato*, his right corresponded with the designation referred to in the statute 10 Henry 7, as a manor and advowson "whereof some of the King's progenitors, Kings of England, were seised in fee simple or fee tail."

As to the inquisition set forth in the bill of exceptions, it was to be observed that it was on the face of it historically inaccurate, though correct in the result. The daughters of King *Edward 4* were not coparceners as there stated. *Elizabeth* should have succeeded alone. Her brothers also, as one of their Lordships observed, were overlooked in that document, as though they never had existence, and so was

(o) 7 Mod. 78, and Cro. James, 248.

A BILL of foreclosure was filed in the Court of Chancery in *Ireland*, in the year 1817, against the Appellant, and another defendant since deceased; and a decree was pronounced in the year 1821, whereby it was ordered that, in default of payment, by the Appellant, of the mortgage-money and other incumbrances therein mentioned by a certain day, the mortgaged premises should be sold. No effectual sale took place under that decree. The mortgagee, plaintiff in the cause, died in 1826, and in 1827 *Denis Clarke*, a judgment-creditor of the Appellant, filed a bill of revivor, and the cause was revived. After various proceedings by revivor and otherwise, a decree was pronounced on the 26th of *April* 1832 for carrying into effect the decree of 1821; it was enrolled on the 14th of June 1832, and the Appellant filed a bill of review, which, being demurred to by *Clarke*, was dismissed by an order of the said Court of Chancery, dated the 23d of *January* 1833. *D. Clarke* having died in October 1834, the above named Respondent, his widow and personal representative, filed her bill of revivor, and by several orders, dated respectively the 3d, 16th, and 24th days of January, and 22d of April 1835, the cause and all proceedings had thereon were revived. By another order, made by the Master of the Rolls in *Ireland* on the 9th of *June* 1835, it was referred to the Master to settle and approve a proper deed to be executed by the Appellant, in pursuance of the Act 4th & 5th Will. 4, c. 92, for abolishing fines and recoveries, and substituting more simple modes of assurance in *Ireland*.

The Appellant presented a petition of appeal to the House of Lords on the 18th of February 1836 against the said decree of the 26th of April 1832, the order of

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King *Henry 7*, *Edward 3* being the father of *John*, Duke of *Lancaster*, from whom the Lancasterian line derived their descent. But there was an important contemporaneous exposition of the term "progenitors" in an Act of Parliament made in Ireland in the same year, 10 *Henry 7*, cap. 22, for re-enacting in Ireland the English statutes. "Item, prayen the Commons, that forasmuch as there had been many and divers good and profitable statutes late made within the realm of England, by great labour, studie, and policie, as well in the time of our Sovereign Lord the King, as in the time of his full and royal *progenitors*, late *Kings of England*, by the advice of his and their discreet counsel, whereby the said realm is ordered and brought to great wealth and prosperity, and by all likelyhood, so would this land if the said statutes were used and executed in the same, wherefore be it ordeyned, &c., that all statutes late made within the said realm of England, from henceforth be deemed and used, &c., in Ireland, &c." Was it to be contended that the people of Ireland, whose lives and fortunes were thenceforward to be governed by the statutes of England, were to search through them, and select such as were enacted merely in the reigns of Princes of the House of *Lancaster*, and to reject all statutes that happened to be enacted when a prince of the House of *York* was on the throne? The absurdity of such an argument would illustrate the forlorn grounds on which it was sought to struggle against the judgment of the Court below in this case.

Another argument urged for the plaintiffs in error was, that, the grant to Bishop *Sherwood* by *Edward 4*, having dis-appended the advowson from the manor, it could not be afterwards re-annexed. If, by an act of the parties, an advowson were dis-appended

1726 (b), to two years from the time of the enrolling of the decree, or to five years from the pronouncing of it, ought not to be applied to a decree pronounced in 1821. In that case the decree was enrolled very shortly before the appeal was brought, and their Lordships construed the time to be from the date of the enrolment. In the present case the decree was pronounced and enrolled in 1832.

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Mr. *Knight* admitted that the decree and subsequent orders were not regularly before the House; neither party had brought them there. The subsequent orders, if they were regularly appealed from, would by relation save the appeal from the decree. So their Lordships lately decided, in *Attwood v. Small*, where an order made in February 1829, and a decree pronounced in 1832, were appealed against in 1835. Here the appeal even from the decree was within the five years from its date, though something more than two years elapsed between its enrolment in June 1832, and the presenting the petition of appeal in February 1836. The best answer to the objection was, that this Appellant was abroad in the kingdom of France, and therefore came within the saving in the standing order, by which five years, according to the original order of 1726, and two years, according to the amendment made in that order in 1829, are

(b) See this order, p. 250, *supra*. By the order of 1829, two years are substituted for five, and it is thereby "further ordered, that in no case shall any person or persons be allowed a longer time, on account of mere absence, to lodge an appeal than five years from the date of the last decree or interlocutor appealed against."

By 6 Geo. 4, c. 120, s. 25, appeals from decrees in the Court of Session in Scotland must be lodged within two years from their dates, and the first fourteen days of the ensuing session of Parliament, except in cases of absence of appellant abroad, or infancy, or insanity, in each of which cases further time is given.

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only act of severance alleged was the grant by King *Edward* to Bishop *Sherwood* of the advowson, distinct from the manor. But this statute annulled the Act by which the temporary severance was caused, and restored the properties to their original union.

The fine alleged to have been levied by William, seventh Earl of *Clanricarde*, to *Brown* and *Mulledy*, was not pleaded, yet, although objected to, it was received in evidence, and permitted to go to the jury. The plaintiffs in error were estopped by their implied admissions on this record, from relying upon the fine. The date of the fine was 1 *James* 2, that is, 1685. The declaration alleged that *William*, seventh Earl of *Clanricarde*, the supposed cognusor of the fine, died the 10th of October 1687, seised of the advowson in gross, leaving *Rickard* his eldest son, who became the eighth earl, and *John* his second son; that thereupon *Rickard*, the eighth Earl, became seised of the advowson in gross; that on the 6th of April 1708 *Rickard* having died without issue, and *John* being a Catholic, the advowson vested in Queen *Anne* (under the Irish Act of 2 *Anne*, to prevent the further growth of popery). These allegations of events in the *Clanricarde* family, which were not traversed, could not have taken effect if the advowson had been passed out of the family in 1685 by the operation of the fine. The declaration alleged a subsequent vesting of the advowson in King *George* 1, under the 2d *Anne*. Then the seisin of *Michael*, the tenth earl, was traversed by the clerk, but his conformity to Protestantism, and the re-vesting of the estate in him, by virtue of that conformity, which were stated in the declaration, were not traversed, and the seisin of his son *John*, the eleventh earl, who inherited by virtue of his father's conformity, was also admitted, at least not traversed. So

heard, if the parties have not complied with the rules of the House. As far as we are yet informed, the appeal is irregular. The Appellant's "mere absence" abroad cannot be held to bring him within the exemption in the standing order, for it is clear he went abroad to evade the decree. Let the case stand over to the 5th of June, and the Appellant may in the meantime present a supplementary appeal or petition, showing his appeal is regular. He will have to pay the costs of the day.

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The Appellant accordingly, on the 12th of May, presented a petition to the House, stating, among other things, that in 1833, after his bill of review was dismissed, he instructed his solicitor to prepare a petition of appeal to this House, but in consequence of his embarrassments he was not then able to proceed with it; that in that year, for the sake of economy and for his wife's health, he went with her to France, where he remained until August 1835, when he returned to Ireland; that he had been advised he had five years for appealing after the date of the enrolment; that the suit abated by the death of *D. Clarke* in 1834, and was not revived until the 22nd of April 1835, more than fourteen days after the commencement of the session, and consequently at too late a period for presenting a petition of appeal in that session; that being out of the kingdom for some time he was informed, and he submitted, that it was consistent with the standing orders of the House to lodge his appeal within the first fourteen days of the then next session, and he took steps for that purpose after he returned to *Ireland*, and he actually lodged his appeal within the first fourteen days of the session of 1836. The petitioner therefore

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case of Lord Chief Justice *De Grey*, from which it might be inferred that such a traverse as that would not be disapproved of by him. In the report of the same case, by Sir *W. Blackstone* (x), that *dictum* imputed to Lord C. J. *De Grey*, by *Wilson's* report, was not mentioned. The case of *Thrale v. The Bishop of London* was also a traverse in a replication; deemed so immaterial a traverse, that the defendant then passed it by in the rejoinder, and traversed the inducement to it, contrary to the principle of pleading, that a traverse cannot be had upon a traverse; nevertheless that traverse was allowed to be good, from the immateriality of the traverse in the replication. These were cases of mixed law and fact which were traversed, whereas the allegation at the conclusion of a declaration in *quare impedit* was a mere inference of law, deduced from a multitudinous statement of facts. The defendants below traversed specially every allegation which they required to be proved, and the plaintiff established all those allegations by evidence. The general traverse, if it put the plaintiff upon any proof, would demand proof of the whole matter of the count, and if so, what could be the use of a number of special traverses? It would be giving to this novel plea all the effect of a general issue in a form of action in which there was no general issue: *Mallory*, p. 210, *Read v. Brookman* (y), and *Glover v. The Bishop of Litchfield* (z), *Stephen* on Pleading, p. 173. It was manifest that the pleader here did not calculate upon such an effect from this plea, because if he had he would not have introduced, as he did, so great a number of special pleas in aid of it. It might be asked, how did the admission of this plea, and the

(x) 2 Sir W. Bl. 770.

(y) 3 T. Rep. 151. 158.

(z) Hob. 162.

elections of Temporal Peers of Ireland, to sit in the Parliament of the United Kingdom.

The Petitioner was the third son of *Dorcas*, Lady *Blackwood*, of *Killeleagh*, in the county of *Down* in *Ireland*, who was created Baroness *Dufferin* and *Claneboye*, by patent, dated the 31st of July 1800, with remainder to the heirs male of her body. On her death, on the 18th of *February* 1808, *James Stevenson Blackwood*, her eldest son, succeeded to the title under the limitations in the patent, and he was afterwards elected and sat in the Parliament of the United Kingdom, as one of the Representative Peers for Ireland. Upon his death without issue, in 1836, the Petitioner, who had been the third son of the Baroness, succeeded to the title, the Hon. and Rev. *John Blackwood*, the second son, having died without issue in 1833.

Mr. *Crawford*, counsel for the Petitioner, after stating the pedigree, &c., called witnesses to prove the material points. The patent of creation being in Ireland, he called Mr. *Parrott*, Clerk of the Journals, to produce the 14th volume of the Journals of the Committees of Privileges, and desired him to read from page 30 of that book, the recital there contained of the limitations in the patent.

In answer to a question from Lord *Shaftesbury*, the Chairman of the Committee, the learned counsel said the patent could, as he was instructed, be produced; but as it would take some days to bring it from Ireland, he submitted that the entry in their Lordships' Journals was admissible evidence of the limitations.

The recital was then read from the Journals of the Committees of Privileges, and was admitted to be sufficient. And the Chairman reported to the House that the Petitioner had made out his claim.

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plaintiffs in error. One of the most important of a Bishop's duties was, the providing for the spiritual concerns of the inhabitants of parishes under his charge. It was his duty, when a benefice became vacant, to supply the charge provisionally, and he might do that within the six months which were allowed to the patron to present; but if the six months elapsed, he might and ought to appoint permanently during the life of the incumbent whom he selected. But in either case he acted for the patron, and in his right as his trustee—in some books called the attorney of the patron for that purpose. His interference in filling a vacant benefice was not necessarily referable either to title or patronage. "If the ordinary collates within the six months and his clerk is inducted, yet the rightful patron is not put out of possession, nor put to his *quare impedit*, but may present:" *Green's case* (b). "If a bishop collates without title to a church presentable, and his clerk is inducted, yet that should not put the rightful patron out of possession," &c. "In such case no plenarty by collation can be pleaded against the patron, for no plenarty is available in law against him who has title to present, but only plenarty by presentation:" *Boswel's case* (c). And in the case of *The Queen v. The Archbishop of York* (d), it was decided that as not one, so not two, three, or more collations gave any possession of an advowson to a Bishop, though he should collate not as ordinary but as patron. *Mallory*, p. 26, says, "The right of presentation in the patron seems to be such as that even the ordinary's collation is but in right of the patron and by his default; and that even when the king presents by lapse, he does not present as supreme ordinary, but

(b) 6 Rep. 29 b.

(c) 6 Rep. 50 a.

(d) 1 Leon. 226. S. C. Cro. Eli. 240.

he had brought an action against the Duke in the year 1818 to recover various sums of money which he had lent to him in the years 1812 and 1815, and for which he had his bond to secure payment with interest; that the Duke's attorney signed a *cognovit* in the said action for 8,480 *l.* principal, interest and costs, and judgment was entered up thereon and duly kept on foot; that the Respondent, for obtaining satisfaction of the judgment, sued out a writ of *fieri facias* in November 1824, directed to the sheriff of *Oxfordshire*, who by virtue thereof took in execution divers goods and chattels in the possession of the Duke, at and about his mansion-house at *Blenheim*; that the Appellant claimed part of the said goods, and brought an action against the said sheriff for taking them, and obtained a verdict therein; that in May 1833, there being then due to the Respondent on the said judgment 12,696 *l.* and upwards, he sued out a writ of *pluries testatum fi. fa.* against the Duke, and the then sheriff of *Oxfordshire*, by virtue of said writ, took in execution divers goods and chattels in and about the mansion-house and premises at *Blenheim*. The bill further stated and charged, that the Duke of *Marlborough* and the Appellant represented to the said sheriff or to his officers, that the goods and chattels so taken in execution were the absolute property of the Appellant, and they promised to indemnify the sheriff if he would return *nulla bona*, and the sheriff upon receiving an indemnity did accordingly return *nulla bona* to the said writ, whereupon the Respondent brought an action against the sheriff for a false return, which action was still pending. That the Duke of *Marlborough* resided at *Blenheim* in the said month of May 1833, and ever since, and there was then, and has been ever since, in and about the mansion-

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cannot trace more than nine instances in which this benefice has been filled. The property belonged originally to the *D'Arcy* family. In 1529 *Dermott Martin* was presented by *William D'Arcy* upon the demise of the preceding incumbent, who was *Thomas D'Arcy*. Then the property came to King *Henry 8*, and he exercised the right by presenting *William Cocks*. In 1615 appeared the entry of Mr. *Carter*, being the incumbent, Lord *Clanricarde* being the patron; and in 1626, *Edward Donnellan* was presented by *Richard*, fourth Earl of *Clanricarde*. In 1660 came *Barry's* presentation, by the grant of the Earl of *Clanricarde*; and in 1691 Mr. *Warburton* was instituted by the Crown, upon the promotion of the preceding incumbent. These were seven out of nine instances; one of the remaining two was the usurpation of Bishop *Dopping*, who collated his own son in 1695, and the second was the collation of the last incumbent, Mr. *Wynne*, while Lord *Clanricarde* was a minor and living abroad. There is no instance of the alleged grant to Bishop *Sherwood* having been acted upon. Two writs of *quare impedit* were sued out against Bishop *Dopping*; he complained to the House of Lords in Ireland of a breach of privilege committed in his person against the House. The attorney was brought to the bar and discharged, upon making an apology. There was no verdict of a jury or judgment of a court in that case.

It is competent for your Lordships in your appellate jurisdiction to look to the whole of the evidence as set out upon the record, and, if your Lordships should be satisfied that, independently of any evidence to which any objection was urged, a title was legally established in favour of the plaintiff below, to confirm the judgment. There are several cases in

made applicable to the Respondent's debt; that the Respondent was always ready and willing to pay to the Appellant what, if anything, was due to him from the Duke on the security of the said goods and chattels; that the Duke and the Appellant had in their possession or power, divers deeds, bills of sale, assignments and accounts relating to the matters aforesaid, and ought to set forth a list of the same, and leave them with their clerk in court.

The bill, after further charging the Duke of *Marlborough* with keeping away witnesses necessary for the Respondent in support of his action, and that the Duke and Appellant had used all means in their power to prevent him from obtaining payment of his judgment debt, prayed, among other things, that it might be declared, that all the said bills of sale and assignments were void, as against the Respondent, and that the same might be ordered to be delivered up and to be cancelled; and that it might be referred to one of the Masters to take an account of what was due to the Respondent from the Duke of *Marlborough* upon the said judgment, and also an account of all pecuniary dealings between the Duke and the Appellant since the beginning of 1823; and if the Master, upon taking the last-mentioned account, should find a balance due from the Duke to the Appellant, that in that case he might be directed to inquire and state whether the Appellant had any *lien* for payment thereof upon any of the goods and chattels at *Blenheim*, the respondent thereby offering to pay the Appellant what should be so found due to him upon the security of the said goods and chattels, and that the value of the same, and the particulars whereof they consisted, might be ascertained, and that they might be sold, and the proceeds applied in payment of the Respondent's debt and costs, and of

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by the Bishop of *Meath*; that in 1695, *Anthony Dopping* was collated by the Bishop of *Meath*, and in 1741, *Peter Warburton* was presented, not by the Earl of *Clanricarde* but by the King, in consequence of a vacancy created by that *Anthony Dopping* being made a bishop. In 1784 *Henry Wynne* was collated by the Bishop of *Meath*, and he held the living down to the year 1828, when Mr. *Alexander*, the present incumbent, was collated by the present Bishop of *Meath*. How were these successive collations without any opposition to be accounted for, the clerks so collated continuing to hold the living to their deaths, and upon their respective deaths, the then bishop again collating to the living, the strongest proof of the continued exercise of the right? Against such proof, a verdict was obtained in consequence of the admission of documents not duly authenticated and of the misdirection of the Court. Those documents were the only material evidence for the plaintiff below, and it was necessarily to be inferred, that they produced the verdict, and therefore the cause ought to be sent to a new trial.

But independently of the unauthenticated documents, how did the plaintiff make out his title? It was admitted that, by the grant of *Edward 4* to *William Sherwood* Bishop of *Meath*, and his successors, the advowson had been severed from the manor of *Rathweir* and became an advowson in gross. The plaintiff produced a grant to *John King* and his wife, by letters patent of King *James 1*. In that grant nothing was said about the advowson of this church. It was a grant of the manor of *Rathweir*, with all the rights and advowsons belonging to the manor. The only way in which the Earls of *Clanricarde* could set up any title under that grant was by showing that, when King *James 1* executed the letters patent, the

to *Charles Richardson*, and he insisted that the legal property in the said goods and chattels was vested in him, and that all the charges in the bill relating to the pretended agreement between the Appellant and the Duke for the resale of the said goods and chattels to the Duke were unfounded; and he insisted that the Respondent had not made out a case to entitle him to any account of the pecuniary dealings between the Appellant and the Duke; and that the said bills of sale, assignments, and legal instruments were the Appellant's title-deeds to the said goods and chattels, and the Duke of *Marlborough* used the same at *Blenheim* by permission of the Appellant, but not as his own absolute property; and the Appellant did not believe that he was a trustee of the said goods and chattels for the Duke of *Marlborough*; but as between himself and the Duke, he claimed to be an equitable mortgagee, or to have a lien on them for a debt of 8000*l.* and upwards, due to him from the Duke; and upon payment of the said debt into court, the Appellant was willing to deposit in court all the bills of sale, assignments and legal instruments in his possession. The Appellant submitted that he was not bound to state the considerations which he gave for the said bills of sale, &c.

The Respondent took exceptions to the answer for insufficiency, in respect of its not discovering the consideration given. Some of the exceptions were allowed, and the Appellant further answered, and annexed to his answer two schedules, in one of which he set forth an account and abstract of all the bills of sale and assignments of the said goods and chattels at *Blenheim*, not belonging to the late Duke of *Marlborough's* trustees, and of which he claimed the benefit against the Respondent; and in the other he

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said *Rickard* and *John Morgan*, the elder, conveyed unto the said *John Morgan*, his heirs and assigns for ever, (among other things,) the advowson or right of patronage of the rectory of *Rathweir* and *Killucan*. That was the only deed in which the advowson was mentioned by name, and that deed destroyed the title of the *Clanricarde* family, by showing that the advowson, if it ever belonged to them, was conveyed away from them.

The first plea of the Bishop to the fifth count of the declaration traversed the appendancy of the advowson to the manor of *Rathweir*. There was, therefore, a distinct issue raised on that fact. The next material plea was a denial that *Rickard*, the fourth earl, was seised of the manor with the advowson appendant; and there was also a denial that *Edward Donnellan* was instituted and inducted on the presentation of *Rickard*, the fourth earl. The plaintiff below, to prove the facts so put in issue, offered a deed of grant, which was stated to have been found in *Lowton House*. It was not pretended that that was an act of the fourth Earl of *Clanricarde*, whose seisin was traversed, or a presentation of *Edward Donnellan*, whose alleged presentation was traversed. It had been contended, that the defendants below had no right to offer in evidence a certain fine, because it was not properly admissible upon any of the issues. But upon what issue was the alleged grant of *Ulick*, fifth Earl of *Clanricarde*, or the presentation of Mr. *Barry*, admissible evidence, unless it was upon the general issue, to prove the title of the plaintiff below? Was it because *Ulick*, the fifth earl, granted the next presentation to Dr. *Donnellan* that therefore *Rickard*, the fourth earl, was seised of the advowson, or what proof did that afford that *Edward Donnellan* was pre-

Corporation of Liverpool (g). The documents, the production of which has been ordered by the Court below, are the evidences of the Appellant's title to the goods and chattels comprised in them, and for which he paid full consideration. To compel a purchaser to produce his title-deeds, is contrary to the practice and principles of courts of equity. There are several late decisions upon evidence, in tithe cases, bearing out the doctrine contended for by the Appellant: *Bligh v. Berson (h)*, *Brazier v. Mytton (i)*, *Tomlinson v. Lymer (k)*, *Tomlinson v. Booth (l)*.

The Respondent's bill impeached the bills of sale and the assignments, and sought to set them aside as fraudulent. The Court, under such circumstances, ought not to have ordered production of the instruments before the hearing, without a very special cause: *Beckford v. Wildman (m)*, *Tyler v. Drayton (n)*. In opposition to the principle laid down in these cases, the Court below ordered production of the documents in question, on the authority of *Balch v. Symes (o)* and *Kennedy v. Green (p)*, which were cases involving special circumstances. Notwithstanding the case *ex parte Caldecott (q)*, where the Commissioners of Bankrupts, under the 33d & 34th section of the Act, 6 G. 4, c. 16, ordered the production of a mortgage-deed, a mortgagee was never compelled until lately to produce his mortgage-deeds, except upon payment of principal, interest and costs: *Postlethwaite v. Blythe (r)*. The only ground of suspicion of fraud on the part of the Appellant was, that the goods were

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(g) 1 Myl. & K. 88.

(h) 7 Price, 205.

(i) M'Clel. & You. 613.

(k) 2 Sim. 489.

(l) 4 Sim. 461.

(m) 16 Ves. 438.

(n) 2 Sim. & Stu. 309.

(o) 1 Turn. & R. 87.

(p) 6 Sim. 6.

(q) 1 Mont. 55.

(r) 3 Madd. 242.

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allowed to remain in the use and ostensible possession of the Duke of *Marlborough*. But it was held in this very case, and in others of later occurrence, that a bill of sale is not fraudulent by reason of the goods remaining in the possession of the vendor or debtor: *Latimer v. Batson* (s), *Martindale v. Booth* (t).

The *Lord Chancellor* :—The Respondent's bill treats the Appellant as equitable mortgagee, as an incumbrancer for 700 l., and states, in effect, that the Duke of *Marlborough* is owner of the property, subject to that debt.

Mr. *Temple* and Mr. *Ellison* for the Respondent:—The Appellant's claim on the goods in the use and possession of the Duke of *Marlborough*, is liable to much suspicion. If he has an honest claim and lien on the goods comprised in the bills of sale, what injury can he sustain by producing them? The Respondent will be unquestionably entitled to a full disclosure, if he will only amend his bill and submit to the delay and expense of beginning again. The parties to the action are at issue; the venue is laid in *Oxfordshire*, but they have been waiting the result of this appeal. The Appellant can, at most, be only trustee for the Duke of *Marlborough*, who has the beneficial interest in the goods and chattels, and by the operation of equity, the Respondent's judgment attaches on that interest.

The rule that a purchaser for valuable consideration cannot be compelled to produce his title-deeds does not extend to bills of sale and assignments, of which the Respondent demands inspection. They are

(s) 4 Barn. & C. 652.

(t) 3 Barn. & Adol. 498.

not title-deeds. The distinction between title or purchase-deeds and mortgage-deeds is stated by Lord *Eldon*, in *Postlethwaite v. Blythe* (*u*). A defendant cannot protect himself by his answer against answering fully: *Ovey v. Leighton* (*x*). A plea would, in some cases, be the proper mode of protection, but here a plea would not be a protection against the discovery sought by the Respondent: *Hardman v. Ellames* (*y*). The question in this appeal has been decided by *ex parte Caldecott* (*z*). There is no doubt that the Duke of *Marlborough*, the mortgagor, would be entitled to inspection of these deeds before redeeming, and it is equally certain that the Respondent is entitled, as judgment-creditor of the Duke, to stand in his place, he offering to pay the Appellant whatever is justly due to him on the security of the Duke's goods and chattels. The Respondent, in that view of the relative situations of the parties, has a right to know, by inspection of the bills of sale and assignments, what is the real amount for which the Appellant has a lien on the goods. The case made by the Respondent in his bill is not, as stated by the Appellant's counsel, that the bills of sale were obtained by fraud. The Respondent's bill charges that the Appellant did not give good or valuable consideration to the Duke for the goods comprised in the bills of sale, which he prays may be declared void as against him. But even if the bill charged fraud, the Respondent would be entitled to production of the documents: *Beckford v. Wildman* (*a*). There Lord *Eldon* said, "Where the object of the suit is to destroy the deed, the plaintiff has a right to have it produced for the usual purposes

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(*u*) 2 Swanst. 256.

(*x*) 2 S. & S. 234.

(*y*) 2 Myl. & K. 732.

(*z*) 1 Mont. 55.

(*a*) 6 Ves. 438.

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of this deed, independently of the question of admissibility in evidence. It was a cancelled deed, and without a seal. It purported to have been executed in the year 1637. How did this deed get into the possession of Bishop *Dopping*, who was not Bishop of *Meath* until long after that date? It professed to be a deed granting the next presentation to Dr. *Edward Donnellan*. Where should that deed be? Not in the custody of the bishop, but with the grantee. If a search had been made among the papers of the family of the grantee, and the deed had not been found there, but was produced from the registry of the diocese, it might be justly said, that although the deed would most properly have been in the possession of the grantee, yet inasmuch as the bishop had acted on it, and it was found among the diocesan records, the Court must, under such circumstances, admit it in evidence.

Numerous cases were referred to on this point. The case of *Bullen v. Michel* (*h*), on which the plaintiff below mainly relied, differed from this, and was an authority to show the deficiency of his evidence. A monastery on its dissolution had come into the King's hands; he had granted it out again; a portion of the possessions had been granted to a person under whom the Earl of *Bath* claimed; the Earl had in his muni-ment-room the title deeds relating to that property, and among other deeds was found a chartulary of the abbey. Upon proof of these facts, it was held that the document came from the proper custody; for Lord *Bath* was possessed of part of the land to which the document related. But if there had only been evidence that A. B. had gone into the house of Lord *Bath*, and brought away that chartulary without proof how it was kept, and without connecting Lord *Bath*

(*h*) 2 Price, 399.

to which the Respondent is entitled may be administered on this record.

The Respondent alleges in his bill that he is a judgment-creditor of the Duke of *Marlborough*, that a writ of execution was delivered to the sheriff, that the sheriff returned *nulla bona* with respect to the property on which the Respondent supposed he had a right to have his debt levied. The case made by the bill is, that at various times, and by various deeds, the dates of which are mentioned, the Duke of *Marlborough* assigned to the Appellant, without consideration, the property in question. It then alleges, that by a transaction with one *Richardson*, who had a title to a debt of 700 *l.* against the Duke of *Marlborough*, the Appellant obtained possession and a title by assignment to certain property for the purpose of securing that debt. The bill challenges the legal title under the assignments, although it does not question the title of the Appellant to stand in the place of *Richardson*, to the extent of that debt; and after so stating the case, it alleges that the Respondent “now is, and has always been ready and willing to pay to the Appellant what, if anything, is due to him from the Duke of *Marlborough*, upon the security of the said goods and chattels;” and then it prays “that it may be declared.”—[His Lordship read the prayer, and proceeded.]—Now, I apprehend that if, upon the hearing, it should appear that there were assignments made by the Duke of *Marlborough* to the Appellant without consideration, and that the Appellant also had an equitable *lien* on the property of the Duke to be affected by the Respondent’s execution, although the Court might be of opinion that the assignments was void for want of consideration, yet the Appellant having an equitable mortgage on the

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case the deed was nugatory. The case offered in evidence purports to be a case for the opinion of counsel on the part of *Anthony Dopping*, Bishop of *Meath*, stating that, in 1637, *Ulick*, Earl of *Clanricarde*, granted to Dr. *Donnellan*, incumbent of *Rathweir* or *Killucan*, the next presentation of that living, &c. If it contained such statement, it was at variance with the fact, for an original visitation-book of the diocese of *Armagh* for the year 1664 was produced, from which there was read this entry: "At a triennial visitation for the diocese of *Meath*, *William Barry* appeared and exhibited *collation* of the rectory and vicarage of *Killucan*, granted by *Anthony*, Bishop of *Meath*, dated the 16th January 1642." According to the evidence of this visitation-book there could not be any presentation under this deed. The fact, therefore, according to the evidence, was contrary to the statement in the case, supposing the case to have stated it. But how was this case evidence against the present Bishop of *Meath*? There was no proof that the case was drawn by *Anthony Dopping*, Bishop of *Meath*; it was not proved to be in his handwriting, or to have been signed with his signature, or to have been brought from any place of deposit of his papers. It was not authenticated as a statement made by him or in his behalf, but it was found in the same way as the deed in *Lowton House*, with which it was not shown that he had been connected.

The argument for the plaintiff below on this point, referred to a class of cases, such as *Higham v. Ridgway* (q), a case which furnished a clue to the others, as to entries made against a man's own interest. If a party made an entry charging himself, that entry after his death would be evidence in an action between third parties. But to say that it would be

(q) 10 East. 109.

Marlborough, he only claimed in equity to be a mortgagee, or to have a *lien* on all the said goods and chattels to secure payment of the said debt of 8,000*l.* and upwards, then due and owing to him from the said defendant, the Duke of *Marlborough*, and that all the said goods and chattels which were comprised in all the said bills of sale, assignments, and legal instruments, and comprising all the said goods and chattels on the said premises at *Blenheim* which were not heir-looms, and which did not belong to the trustees of the late Duke of *Marlborough's* will, were a very scanty and insufficient security for the payment of the said debt, and that the equitable interest of the defendant, the Duke of *Marlborough*, in the said goods and chattels in and upon the said mansion-house, estate, and premises at *Blenheim*, was not a beneficial or valuable interest."

It was represented at the bar that the meaning of the Appellant was, that although he was entitled to insist on the absolute ownership of the goods by virtue of the assignments, he was willing to consider himself as only having a charge to secure the payment of the debt. It is no wonder that the Respondent, seeing such an answer, was desirous of some further discovery, that he might be able to ascertain whether the Appellant had only a mortgage title, which would entitle the Respondent to come into a court of equity, and place himself in the situation of the Duke, so as to work out his own debt; and accordingly exceptions were taken, and in the further answer the Appellant refers to a schedule containing a more accurate description of the assignments. He says, "that he, in the first schedule to that his answer annexed, and which, together with the other schedule there-

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capacity, that declaration would be receivable in evidence against his successors. A letter found in a corporation chest, containing a statement by a person who, at the time, was not a burgess, was held inadmissible against the corporation: *The King v. Gwyn* (s). In *Maddison v. Nuttall* (t), which was referred to, the question turned on the admissibility of a terrier found in the hands of a landowner in the parish. It was not tendered in evidence as a document authenticated by being brought from the proper place of custody, but proof was given to authenticate it *aliunde* by comparison of the signature and the writing in that terrier with documents admitted to be in the handwriting of the rector of the parish at that time, and showing that this terrier was in the same handwriting. It was held that that document was receivable in evidence against the rector's successors, not on the ground that it came from the proper custody, but as a statement made by the rector in a matter touching the rectory against his interest. The plaintiff below referred to that case to show that the statement made by the Bishop of *Meath* against his interest or the interest of his diocese, ought to be received in evidence against his successors. If it had been proved that *Anthony*, Bishop of *Meath*, had written or authorised that statement, *Maddison v. Nuttall* would apply, but in the absence of that proof it was inapplicable. There was no evidence that he wrote or authorised, or ever saw the case. It was nevertheless contended that the document was sufficiently authenticated by being found in *Lowton House*. All the objections to the reception of the deed on that ground applied to this case in the same manner.

(s) Str. 401.

(t) 6 Bingh. 226.

whether he has stated it correctly or not. To protect himself therefore against the liability to produce the document, he should take his stand on the interrogatory, which asks him to set forth the particulars of the deed under which he claims. The answer would have been proper if it had said, "I have the deeds in my possession, but you do not entitle yourself, by the proceedings, to see the contents of the documents." If the defendant chooses to pretend to give a discovery, the plaintiff is not bound to take that representation, but is entitled to see the documents.

Now, I find that the schedule is an abstract of all those deeds; it is not a mere statement of such a deed, of such a date, between such parties, which would leave the Respondent entirely in the dark as to the contents, but the Appellant sets out what is quite sufficient for ordinary purposes—whether truly abstracted or not, is a point of which the Respondent has a right to be satisfied. But when I look to the schedule, which is the most important part of the papers, and which is the only part not printed, I find a statement of the prior deeds which are immaterial from the mode in which the last deed deals with those prior deeds. The deed of the 1st of June 1829 recites the prior deeds, and then there is the proviso as to the property comprised in those deeds, and in this last deed, it seems uncertain on the face of it, whether it embraces all or not, but at all events, it is subject to the redemption of certain parts.

The last deed, which is for further security, is of August 1832, and reciting that the now recited indentures were only "for the better securing the said sum of 1,800 £. and interest, so due and owing to him as aforesaid; it was witnessed, that in consideration

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to be read. Was it not quite as much a violation of principle and of policy to receive the case through another medium as from the counsel or the attorney? If production by third persons were allowed, then an attorney to whom a confidential letter had been written might in any case collusively put that letter on a table, and allow some partisan of the writer's adversary to take it away and produce it in evidence. That could not be the doctrine of law, because it involved an absurdity, allowing parties to do indirectly that which, for the purposes of general policy, was not allowed to be done directly. Lord Chancellor *Brougham*, in *Bolton v. The Corporation of Liverpool*, says (y), "It seems plain that the course of justice must stop if such a right exists. No man will dare to consult a professional adviser with a view to his defence or to the enforcement of his rights. The very case which he lays before his counsel to advise upon the evidence may, and often does, contain the whole of his evidence, and may be, and frequently is, the brief with which that or some other counsel conducts his cause. The principle contended for, that inspection of cases, though not of the opinions, may always be obtained as of right, would produce this effect, that a party would go into court to try the cause, and there would be the original of his brief in his own counsel's bag, and a copy of it in the bag of his adversary's counsel." "If it be said, that this Court compels the disclosure of whatever a party has at any time said respecting his case, nay, even wrings his conscience to disclose his belief, the answer is, that admissions not made, or thoughts not communicated to professional advisers, are not essential to the security of men's rights in courts of justice. Proceedings for

(y) 1 Myl. & K. 88; see p. 94.

On these two grounds, therefore, I think your Lordships may safely affirm the order of the Court below ; *first*, that this is a case in which the Respondent is not only seeking to redeem, but is seeking to have an instrument treated as a mortgage security, which the Appellant has set up as an absolute title ; and *secondly*, because the Appellant, having set out what he states as the contents of the deed, the Respondent, under those circumstances, is entitled to see whether the abstract be or not a correct abstract of those deeds, of which he asks the production. I therefore think that the order of the Court below ought to be affirmed, with costs.

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Lord *Brougham* :— I entirely agree with my noble and learned friend, that there can be no doubt in this case. If the schedule had been printed, we should have seen, earlier in the day, the points in the case, and a considerable part of the arguments might have been spared and much time saved. I ought to add that, in the cases which have been cited, there is nothing that goes against the decision. I do not think the points arise to which the arguments in those cases were mainly applied.

If, in the peculiar circumstances of this case, an application had been made to the House to forward the hearing of this appeal, the venue, I take it for granted, being in *Oxfordshire*, the cause might have been tried at the last spring assizes. The order appealed from was made in *July* 1836 ; the appeal, I suppose, was lodged as early as possible ; and I have no doubt that there would have been no objection on the part of the Appeal Committee, your Lordships acting on their report, to have so sped the hearing as

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to have enabled the parties to go on with the action at the last assizes. I have no doubt that the application would have been granted, if made.

The order of the Court below was affirmed, with costs.

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APPEAL

FROM THE COURT OF EXCHEQUER IN EQUITY.

GEORGE BROOKE and Others - - - *Appellants.*LOUISA CHAMPERNOWNE and Others - *Respondents.*

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March 13,
14. 20.
July 17.

A., in December 1812, agreed to become the purchaser of a reversionary estate ; B., the vendor, agreed, on or before the 1st of May then next, to make out a good title. A. was to be entitled to the rents and profits of all and singular the messuages, &c., from the 1st of May then next, or from such time as the said purchase should be completed. A. had at the time of making the agreement paid part of the purchase-money, and he promised, for the considerations aforesaid, that he would, on the said 1st of May, pay the remainder as and for the absolute purchase, &c. A. further agreed to pay all and every such sum and sums of money for the increased value of the said messuages, &c., by or in consequence of the deaths of any persons for whose life or lives any of the messuages were theretofore granted. The purchase was not completed for a very considerable period. The vendor filed his bill for a specific performance. The Court made a decree, referring it to the Master to inquire when the vendor could make a good title, and how much the value of the estate had been increased by the deaths of the persons on whose lives any portions of it were holden. HELD that this decree was correct, and that the contract did not give the vendor a right to demand payment for the increased value of the estate from the wearing as well as the dropping of lives.

*Vendor and
Purchaser.
Interest.
Dropping and
Wearing of
Lives.*

THIS was an appeal against a decree of the Court of Exchequer in equity, made in February 1821, upon a bill filed by the Appellants and other persons whom they now

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land land held in their private right, but they were also in the habit of granting such lands under different seals. If this advowson was granted as part of the possessions and under the seal of the Earldom of *March*, the statute of 10 *Henry* 7 did not apply to it either in word or in spirit. In an English Act of Parliament, 4 *Henry* 7, c. 14, entitled "An Act, touching the passing of Feoffments and other Grants, &c. under the special seal of the Earldom of *March*," there was a recital, that every grant made by King *Edward* 4, of any part of the possessions of the Earldom of *March*, was made under the special seal of that Earldom. If so, the advowson in question was granted under the seal of the Earl of *March*, and not under the great seal of *England*. *Edward* the 4th being King, might have passed the advowson either by letters patent sealed with the great seal of *England*, or with the private seal of the King, and no livery of seisin was necessary. But it appeared by the recital of this Act, that every grant which *Edward* 4 made of the Earldom of *March*, was sealed with the seal of that Earldom, and it was thereby enacted, that "All feoffments, gifts, grants, &c., where sealing is required to be made of any parcel of the said Earldom, be had, done and made by the King, under the broad seal of his Chancery, as it is used in all other things concerning the Crown by the course of the common law, and by none other seal." That was a prospective Act of Parliament, and recited the fact that *Edward* 4 made his grants of the property of the Earldom of *March* under the seal belonging to that Earldom.

At the date of the grant in question, the kings of *England* had not assumed the title of kings of *Ireland*, they were then named lords of *Ireland*. The Irish statute 33 *Henry* 8, c. 1, conferred the title on

thereby for himself, &c., further promise and agree to and with Brooke, &c., that he, Champernowne, should pay to, &c., all and every such sums of money for the increased value of the said borough, manor, &c., or any part thereof, by or in consequence of the death or deaths of any person since the 29th September 1831, for whose life or lives any of the said messuages, &c., were theretofore granted. And lastly, it was agreed by Brooke and Champernowne, &c., that such increased value should be ascertained by indifferent persons, whose award should be conclusive."

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Mr. Pemberton and Mr. Swanston (Mr. Lynch was with them), for the Appellants:—This is an appeal against a decree of the Court of Exchequer, first on the ground that that Court has put an erroneous construction on a contract and made a decree on such erroneous construction; and secondly, that if the House should deem the construction not to be erroneous, then the decree is in other respects inaccurate and defective, and the directions upon it wrong. The agreement when referring to the dropping of lives, cannot mean the dropping of them after the purchase has been completed. This estate had before been the subject of an agreement for purchase by one Charles Scott; that was in May 1811. In October 1811, Champernowne agreed to purchase his interest. The abstract of title was delivered within ten days after this contract, so that in October 1811, when Champernowne entered into an agreement to take Scott's interest in these lands, he knew the title which he thus agreed to take. He afterwards paid a portion of the purchase-money. Difficulties arose, and all parties agreed to put an end to things as they then were. Then came the agreement of December 1812, in which that of the preceding year was referred to as not complied with.

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In this second agreement, the Appellant contends that there is an express stipulation for the performance of the contract on the 1st of May 1813. In the former contract, it was contemplated that the purchase might be completed before or after the time therein stipulated. This makes an essential difference between the two contracts, for payment on a day certain is here expressly provided for. Then follows the clause on which the question before the House mainly depends, namely, that which provides for the way in which the increased value shall be known (c). Every life which has dropped since 1811 should be calculated; the whole of what constitutes the value of the estate goes to the purchaser after that. The Respondent Champernowne, in his answer, stated that his refusal to complete the purchase did not arise from any objection to the estate itself, but that he conceived, that under the circumstances of the case, he was not bound to complete the purchase. If he had relied in his answer on the want of a title, the only proper decree would have been, to refer it to the Master to ascertain whether there was a good title. But as the delay here arose from other causes, the decree necessarily goes farther, and directs an inquiry into the increased value of the estate from the dropping of lives. Now to all substantial purposes, the title was completed and satisfactorily made out before that period. The Master, however, did not find that the vendors were able to make a title before the institution of the suit, but exceptions were taken to that finding, and were allowed by the Court, so that it now stands, that before 1817 there was a good title made to the estate, for in March 1817, the counsel for Mr. Champernowne had declared the title to be in a marketable state. The delay so far, therefore, was entirely the delay of the Respondent. He cannot be allowed to

(c) See *ante*, 560, 561.

receive the benefit of it, which he will do if the wearing of lives is not to be taken into the calculation. In making the calculation, the Master proceeded thus: he took each tenant—he found the value of the lives at the time when the contract was made and at the date of his report. The effect of that was, to add to the value of the estate not only the dropping of lives, but the wearing of them. Objections were taken to this report. They were heard by Lord Lyndhurst, who thought the calculation wrongly taken. That decision was itself erroneous. It cannot be contended that the purchaser is entitled to take the rents of the estate and at the same time to be relieved from paying interest on so much of the purchase-money as remains unpaid. What is the benefit which a purchaser derives from the purchase of an estate? When a man purchases an estate subject to lives, the benefit of the wearing and of the dropping of the lives will go into the pocket of the purchaser. The wearing of lives and the rent constitute the value of the estate. Each life is a charge which is constantly diminishing, and in that way the purchaser obtains a continually increasing benefit. He is not to have the calculation made in his favour not only on the dropping, but also on the wearing of lives. The purchaser is either bound to perform the contract as agreed upon, or to return the amount of the rents which he has received. The draft of the conveyance does not make any reference to the mode of settlement between the parties, and for that reason it is that no mention is made of rent or interest. The vendors are entitled to interest on the purchase-money still unpaid, the purchaser having been entitled to the rents from the time of his being lawfully in possession. The bill filed here, is a bill for specific performance, and a decree is asked in conformity with it. The reversal by this

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him, and to his heirs of his body, as land distinct from, and no part of, the Crown." It was impossible that language could be stronger against the proposition, from which the plaintiff below contended that all land belonging to the king, no matter how it came to him, from the moment he acquired the Crown, became merged in his political character.—[Lord Brougham: Lord Holt says, in *The Queen v. Smith* (i), that all lands and tenements of the king belong to him *jure coronæ*, for if he purchase lands to him and his heirs, he shall have them in his political capacity, and the king can have nothing in his private capacity, unless in right of his Duchy or an estate tail.]—The authority of *Plowden* (k) proved that the lands belonging to the Earldom of *March* were no part of the lands of the king, held *jure coronæ*, in the ordinary sense of the words; he did not hold them as part of the possessions of the Crown, which were to go with the Crown at all times. The object of this Act, 10 Hen. 7, was to take back the revenues of the kings of *England* and *Ireland*, which were not part of the possessions of the house of *York*. The very object shown in the Act negatived the fact of its applying to these possessions. The passage cited from Co. Litt. (l), was confined to lands held *jure coronæ*: "And you shall understand that, concerning descents, there is a law, parcel of the laws of England, called *jus coronæ*, and differeth in many things from the general law concerning the subject." No doubt the king holding lands *jure coronæ*, they would be attached to the Crown and go with it; therefore if the king resigned the Crown the next day after the purchase, they would go to the succeeding king. A note to the passage in Co. Litt.

(i) 7 Mod. 78.

(l) 15 b.

(k) p. 234.

ground for refusing the payment of the interest." Here if the party who has in fact had the purchase-money is not to pay interest on it while he has had the benefit of the rents and profits at the same time, he will stand in the very situation of absurdity described by the Master of the Rolls. The case of *Blount v. Blount*, which will be noticed presently, is the only one which appears to be opposed to the claim of the Appellant. In *ex parte Manning (g)*, which was not brought to the attention of the Court on the former occasion, it was said by Sir Joseph Jekyll, Master of the Rolls, "From the time the purchaser's title was confirmed, he was sure of his purchase though the tenant for life had died the next day, and from that time the life was wearing, which is equivalent to the taking of the profits; and in case the purchaser had taken the profits, he must certainly have paid interest."—[The *Lord Chancellor*: Was anything said there in the conditions of sale as to interest?—Nothing. That was the first case on the subject. Then came *Davy v. Barber (h)*, in which it is true that the attention of the Court was not called distinctly to the wearing of lives, but the principle laid down was strictly applicable to a case of that sort. Lord Hardwicke then decided, that where a purchaser has an advantage by the dropping in of lives, the Court will direct an inquiry what interest was proper to be paid by him on that account, and he said, "If the purchaser under a private contract does not pay the purchase-money at the time fixed, he will be chargeable with interest. As he must bear any loss, so likewise will he be entitled to any profits that may arise from the estate." These were the general propositions established by that case. Then comes the

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(g) 2 P. Wms. 410.

(h) 2 Atk. 489.

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case of *Blount v. Blount* (i), where it was declared that "The advantage a purchaser receives from the wearing out of lives has never been considered as a reason by this Court for his paying interest for the purchase-money. The Court, in awarding interest, never regards the execution of articles for a purchase, but the time of the execution of the conveyances, and even then the purchaser shall pay interest only from the time when the possession is delivered. Where, after a person is reported the purchaser, lives have dropped in, the Court has directed the purchaser to make some compensation in respect of the estate being bettered." It is clear that the judgment there must have rested on the peculiar circumstances of the case itself, or else it is not reconcileable with that of *Davy v. Barber*, in which the general principle is strongly and clearly stated, and which has never been overruled. In *Blount v. Blount* too, there must be some mistake, for a purchaser cannot be charged with the falling in of lives or with fines for letting out the estates again, and yet it is so stated there in the judgment, though it appears from the registrar's book that there was no direction whatever in the order as to the fines. It is clear too that *Blount v. Blount* has not since been acted on, for in *Trefusis v. Lord Clinton* (k), a purchaser of a reversion was ordered to pay interest on his purchase-money from the time of the purchase. *Blount v. Blount* was mentioned there, but overruled. The authorities and the practice therefore alike warrant the objections to this decree, which must be reversed.

Sir William Follett and Mr. Wakefield (Mr. Coleridge was with them), for the Respondents:—The

(i) 3 Atk. 636.

(k) 2 Sim. 359.

object of this appeal is to alter a decree made in 1821, and made on the application of the Appellant Brooke, and on which he has acted up to 1831. He cannot now have a right to have this decree set aside. The condition of the contract was, that the payment of the purchase-money should be made on a day certain, and the rents and profits were to belong to the purchaser from that day, provided that he then completed his bargain; but if the same should be settled previously or subsequently, then the purchaser was to be entitled to the rents and profits from the time of such settlement. The right of the purchaser arises from the day of the settlement, and up to that period all charges are paid by the vendor.—[Lord *Brougham*: Would outgoings and charges include fines on the dropped lives?—Every thing would be included. The terms of the contract are, that in case of the death of any life, such should be for the vendor's benefit, to be estimated in the usual way. The vendor is therefore only to receive a benefit from the dropping of lives. On turning to the contract it will be seen, that the proper construction of it is that Champernowne shall be the owner only from the time of completing the purchase, the vendors in the meantime continuing the owners of the estate, and stipulating that if lives dropped an additional value should be paid for the estate. The parties did not provide for the wearing of lives, because they did not consider that so much time would elapse between the contract and the completion of the purchase. This House cannot now add that term to the contract. Interest is now claimed from the 4th of July 1816, on the ground that a good title was then made, that being the date of the approval of the draft. It is said that the purchaser delayed completing the purchase from other

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Parliament from the last day of *Edward 2*, that they be resumed, &c. The resumption could not be applied to the time of *Edward 2*, it must apply to the time of the passing of the Act, and that from that time "they shall be declared void and of none effect."

The law as to the appendancy of advowsons was laid down in Com. Dig., tit. Advowson B. : "An advowson may be appendant to a manor or in gross;" "appendant to a manor is when it has always passed by a grant of the manor *cum pertinentiis*." "If an advowson be in gross, it cannot afterwards by any act be appendant, except where the act which made it in gross be totally avoided, as a recovery after an usurpation." In the case of *The King v. Bishop of Rochester* (m), the law is there distinctly laid down, that if the advowson be once severed from the manor, the resumption or the surrendering it back into the hands of the Crown or owner of the manor, does not re-append it, but it must be some act which makes the grant itself void from the beginning which will alone re-append it to the manor. In *Reynoldson v. Blake* and *the Bishop of London* (n), which was cited for the defendant in error, the judge said, "If an advowson by act of the party be once severed from the manor to which it is appendant, it becomes in gross, and the appendancy is destroyed for ever," &c. It was argued that this being a resumption into the King's hands of an advowson by Act of Parliament, it became appendant again. The case of *Reynoldson v. Blake* was no authority for that proposition. On this part of the case the plaintiffs in error submit that the statute of King *Henry 7* applied to no grant whatever made by King *Edward 4*, of possessions of the Earldom of *March*; that they were not within the spirit, scope, object, or letter of

(m) 2 Mod. 1.

(n) Ld. Raym. p. 192; see p. 198.

the rule : "Where there is no stipulation as to interest, the general rule of the Court is that the purchaser, when he completes his contract after the time mentioned in the particular of sale, shall be considered as in possession from that time, and shall from thence pay interest at 4 *l.* per cent., taking the rents and profits. If, however, such interest is much more in amount than the rents and profits, and it is clearly made out that the delay in completing the contract was occasioned by the vendor, then to give effect to the general rule would be to enable the vendor to profit by his own wrong, and the Court therefore gives the vendor no interest, but leaves him in possession of the interim rents." His Honor followed that rule in *Monk v. Huskisson* (o), and Lord Lyndhurst adopted it, and acted on it in *Jones v. Mudd* (p). As to the wearing of lives, is it not a fallacy to consider that as part of the profits of the estate? It is to put the purchaser in a new position; it is to insist that, instead of paying what has been agreed on as the purchase-money, he shall pay an additional amount. Suppose the increased value of the estate, from the wearing of lives, would amount to a larger sum than the interest on the purchase-money, would the Court, when a defendant had agreed to pay 70,000 *l.* for an estate, compel him to pay 140,000 *l.* on that account? The wearing of lives does not form part of the rents and profits of the estate. The purchaser has a right to say that he did not intend to buy such an estate, that that matter was not inserted in the contract, and that if the vendor intended to claim the benefit of it, he ought to have inserted it in the contract. In a case of this sort the question of who seeks to enforce the contract makes

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(o) 4 Russ. 121. n.

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plea of the Bishop to enter at all into the argument, that the clerk could not plead any plea which would let in this fine against the Earl of *Clanricarde*. The Bishop, at all events, might so plead. But supposing the objection good, this was not the stage of proceedings in which notice could be taken of it. Their Lordships were sitting to decide whether or not certain evidence was receivable, but not on the effect of that evidence at the trial. If the plea was bad, which was not the fact, the plaintiff below ought to have demurred to it. The House could not take notice of it, as it was not in the bill of exceptions, nor noticed in the errors assigned on the record. As a court of error their Lordships' attention was not called to the forms of the pleas at all. The pleas were good. The traverse and the issue taken on that traverse was, that the plaintiff was not possessed of the advowson, and of the right to present in the manner and form alleged. It being argued that this fine would show the title to the advowson out of the plaintiff, his counsel contended that the fine was not admissible in evidence on that issue. The Court below held it was admissible. It was suggested that it was not receivable in evidence unless specially pleaded, and that observation was undoubtedly entitled to great consideration. But the plaintiffs in error contended that it was not necessary to plead it; and, moreover, it could not be pleaded. If a fine was relied on as an estoppel between the parties, it should be pleaded; and if recourse were had to this fine to show that the Earls of *Clanricarde* (who were parties or consors of the fine) were estopped by it in the literal meaning of the word, it ought to have been pleaded. But the question was, whether it was admissible evidence to show that the Earl of *Clanricarde* parted with the advowson, if he

time interest was allowed there. Then as to the giving of interest on the wearing of lives, there are the cases of *Davy v. Barber* (u) and *Blount v. Blount* (x). In the first of these the dropping of lives was considered as an annual profit, and therefore subject to be made the ground of payment of interest by the purchaser. That case does not show that the wearing of lives is to be considered in the like manner, and the same Lord Chancellor afterwards decided the second of these cases, and expressly declared that he never knew the Court take the advantage a purchaser received from the wearing of lives into consideration as a reason for the purchaser's paying interest. But even in *Davy v. Barber* the purchaser had been actually let into possession. It has been said (y), that at the time *Blount v. Blount* was decided the Court did not calculate as well then as now the increased value of estates. That cause of increased value might not be as well understood at that moment as at present, but its existence was known and was taken into consideration, and after discussion on the subject the Lord Chancellor rejected it as a ground for giving interest.—[Lord *Brougham*: You object, as a purchaser, to being compelled to take a different thing from what you bought, but that applies equally to the dropping as to the wearing of lives.]—That objection is not properly applicable to the argument now referred to, for in this contract there is an express arrangement respecting the dropping of lives, but there is none as to the wearing of lives, which is now sought to be introduced by implication into the case. To impose this other term on the purchaser will be to make a new contract. The contract here does not

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(u) 2 Atk. 489.
 (x) 3 lb. 635.

(y) Per Lord Brougham, *ante*,
 vol. 3, p. 23.

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was said if he had pleaded the general issue, the facts stated in the special plea would have been a good answer to the action. So the parties here having traversed the right of the plaintiff to present any evidence showing that the plaintiff had not a right to present, was admissible under that issue. The inducement to this traverse could not be traversed; it was wholly immaterial; the only effect and object in having it on the record was, that if there was any question or matter of law, the opinion of the Court might be taken at once on the law, stated in the inducement, but the fact submitted to the jury was on the traverse; the Court looked to that, and both parties must be governed by it. The traverse was, that the plaintiff had no right to this advowson, and if anything were offered proving that the plaintiff had no right to this advowson, it was properly receivable in evidence. Suppose an action on a deed, and instead of pleading *non est factum*, defendant pleaded *nil debet*, which was a bad plea on special demurrer. If the parties joined issue the plaintiff might prove the whole allegation in the declaration. Though the plaintiff need not have joined issue upon it, being a bad plea, yet if he joined issue he was bound to prove the whole allegation, and under that plea of *nil debet* the defendant might give in evidence anything, showing that the plaintiff had no right of action against him. Now, on this plea of the bishop and the pleas of the clerk, which denied the fact of possession and the right of the plaintiff, the fine was properly receivable in evidence. By those pleas traverse was taken on the ownership of the advowson, and the right to present. It was contended that the conusor of the fine, the then Earl of *Clanricarde*, had done nothing afterwards on it, and that as the plaintiff below showed the Earls of *Clanricarde*

Mr. *Pemberton*, in reply :—There are but two points in this case. First, whether the Appellants are entitled to relief on the merits? Secondly, if they are, whether there is any matter of form preventing them from having the relief which they ask? They ask for interest on the purchase-money which has remained in the hands of the purchaser, but if interest is refused, then they have a right to have an increased amount of money paid to them in respect of the increased value of the estate. What is it that the purchaser contracted to buy? A perpetual annuity of 7,000*l.*, deferred for a certain period, that is, till the expiration of certain lives. On the duration of those lives the greater or less value of the property depends. The purchaser now seeks to have this property without payment of interest on the unpaid purchase-money, though, by the dropping of most of the lives, and the wearing of the rest, the property is now about to fall into possession. It is clear that the purchaser cannot be allowed to avoid paying interest on the purchase-money he has retained, and at the same time to obtain the increased value of the estate. Then the question arises, whether the interest ought to be payable from the time when the contract, according to the terms of the agreement, ought to have been completed, or from the time when a good title was actually made; and, further, whether the purchaser ought to pay the vendor for the wearing of lives between the time of the agreement and the time when a good title ought to have been made. The arguments in the former case, which are reported much more fully in *Clark and Finnelly's Reports* than in *Bligh's*, may be referred to. One argument used on the other side has been, that there is no contract for the wearing of lives. The answer is, that no contract provides for every possible

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contingency, but there are certain things which result from every contract, and this is one of the number. From the moment the contract ought to have been completed the purchaser became entitled to the rents and profits, and the vendor to interest. The special circumstances which may alter this rule in a particular case do not affect the rule itself. The wilful and inexcusable delay of the vendor only entitles him to interest from the time when the title is properly made out, and the purchaser shall pay interest, unless he has kept the money idle and given notice to the vendor that it is lying idle. The matter is therefore the subject of arrangement in a court of equity, though it may not form part of the contract itself. It is said that there is a provision for the dropping but none for the wearing of lives, and the case is argued as if the introduction of the one is virtually an exclusion of the other. That provision will not affect the contract. It was only introduced for the purpose of preventing the vendor from filling up the lives of any of the persons as they fell in. But there is nothing in this particular contract to exclude the construction which is ordinarily put on such contracts by the Courts. The delay in showing a good title is not a ground to prevent the Appellant's equity, for the purchaser did not require a good title, but insisted on his right to put an end to the contract. That at least was the case up to 1827, when the title was confirmed by the Court. The delay was therefore that of the purchaser, and he cannot now use it for his own advantage. One of the objections raised to the Appellant's claim is the form of the bill. It is said that he has not prayed for a compensation in respect of the increased value of the estate from the wearing of lives. but neither has he asked for anything in respect of

the increased value of the estate from the dropping of lives, yet it is clear that he must have it. The prayer is for the specific performance of the contract. The only question, therefore, is, what is the contract? The advantage to be derived both from the dropping and the wearing of lives is included in the contract. It cannot be laid down as a rule that any man must recite in his bill every point of his case, and that if it is not recited in the first instance it may not be introduced into discussion afterwards. As to the case of *Chamley v. Dunsany* (z), all that Lord Eldon meant to say was, that he would not permit the introduction of matter into the decree for the purpose of making it the subject of appeal. That case, therefore, will not apply to the present. Nothing of that sort has been done here, and there is reason why the Appellants should be prevented from obtaining what they seek by this appeal.

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The Lord *Chancellor* :—Having had the honour of attending at your Lordships' bar as counsel in this case upon a former discussion, which did not end in any judgment upon this point, as I think it went off upon a matter of form, I am anxious to take every opportunity of satisfying myself, by looking into the papers upon the merits of the case. But upon one point, I have no doubt whatever whether the Appellant is right or not in principle, or whether the proceedings are or are not in a state to enable you to give the Appellant what he asks. It is clear that in his bill he did not ask what he does now, but assumed the case to be directly the reverse, for the question being whether the purchaser is to be considered in

(z) 2 Sch. & Lef. 690.

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proof, compared with that which is usually required in trials as a security to defend the rights of parties, and protect courts from misapprehension or from fraud in the fabrication of evidence. I do not recollect any case in which those rules which have been adopted to defend parties, and protect the courts in receiving old instruments, have been so little attended to. The most scanty evidence of custody and of facts arising from custody, was produced, though it is certainly doing no more than justice to say, that it was the fault of the parties now objecting to the defective proof of custody, that it was so scanty, inasmuch as they did not cross-examine to it; and it is past all doubt, that a party is not allowed to lie by at the trial, when he might have got answers which would have explained the evidence, and thus to shut the door in the face of the evidence, and then insist that the proof was defective.

The next question on the first branch relates to a case found in the same depository, which in some respects raises a doubt on other grounds as to its admissibility, and raises again the question of proper custody, but not, as it appears to me, to the same degree in which the deed raises it. It does not follow, although the evidence as to the custody of the deed was not sufficient, that the evidence as to the case might not be sufficient, because, undoubtedly, it is a case respecting the affairs of the diocese, and is laid before counsel by a bishop then having the see. That is the second point, and it raises several questions, all of which fall within the comprehensive question, admissible or not admissible, which I have framed on purpose to lay before the learned Judges. The admissibility of that sort of evidence to a certain degree has been tried by questions raised on bills in equity,

open upon the proceedings for the Court to say at what time, as between the parties, the contract ought to be treated as completed, and the purchaser be called on to pay interest on the purchase-money. That point was quite open in the Court below, but it is not so now for your Lordships' consideration. If the Appellant is right in saying that whatever the state of the title, the contract is one that ought to be considered as carried into effect from the 1st of May 1813, he will have established his case.

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Lord *Brougham* :—I agree with my noble and learned friend, that this is a case in which time ought to be given to look over the papers; and if it shall be found that there is any doubt whether the point mentioned was open in the court below, there will be no difficulty in so framing the order as to make the matter perfectly clear. But I am inclined to think it is open in the way my noble and learned friend has stated. I very much regret the absence of my noble and learned friend who heard the case here before, and who heard it in the Court below. I believe his absence is owing to this circumstance. He was aware of the case coming on, and was aware it was the same case; but he understood that this was an appeal from the original decree of 1821. It escaped my noble and learned friend, that though true it is that this is an appeal from the decree of 1821, it involves what took place in July 1831. If he had been aware of that, he would have been here. His absence is owing to the illness of a member of his family, which has taken him for a few days from this country. My Lords, I retain the same opinion which I did when this case was last argued; but upon two matters, one of which has been referred to by my noble and learned

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friend, and the other I have shortly to allude to, I entertain some doubt. I entertain some doubt upon the construction of the contract. But for particular terms in the contract, I should not do so; I wish therefore to have time fully to consider the contract. I entertain some doubt also upon the form of the proceedings, and upon the decree pronounced upon the bill, alluding to the prayer of the bill. The other matters require to be carefully looked into, and undoubtedly I should like to have time to do it. With respect to the case of *Blount v. Blount*, which has been quoted, we have sent for Lord Hardwicke's notes, and we have been furnished with the register-book, but we cannot find any note of it.

It was intimated by counsel that they had the whole of the proceedings in *Blount v. Blount*.

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Lord Chancellor :—My Lords, this case of *Brooke v. Champernowne* arises out of an appeal from a decree pronounced in the year 1821, respecting the purchase of the reversionary interest of an estate held upon lives, and where the party purchasing such reversionary interest, if he has excluded himself from interest upon the purchase-money until a distant period, has undoubtedly made a very bad bargain. But the question is, not whether it is an advantageous bargain or not, but what it is that the parties have in fact contracted for.

My Lords, the contract itself bore date in the month of December 1812. There had been a prior contract of October 1811, which it is not material to advert to, except as it became incorporated with the contract between the vendor and Mr. Champernowne, the purchaser. By the third condition of

that prior contract, it is provided, "that the rents and profits of all and singular the same manor and hereditaments should belong to and be received by the purchaser from the said 29th of September then next, provided the purchase should be then completed; but if the same should be settled either previously or subsequently to that period, then the purchaser should be entitled to such rents and profits from the time of such settlement, and that up to that period respectively all outgoings and charges whatever on the premises should be paid by the vendors; and that in case of the death of any life or lives after that time, such should be to the vendor's benefit, to be estimated in the usual way." This portion of the contract then provides for a certain benefit to accrue to the vendor; namely, that if there should be a life or lives drop, then it should be for the vendor's benefit, to be estimated in the usual way.

My Lords, Mr. Champernowne, by the contract between the parties, became entitled to the benefit of that contract; and it being provided that 7,000*l.* should be paid, he paid 10,000*l.*, a circumstance which becomes material, in order to ascertain the construction which the parties put upon this contract at a subsequent period of these proceedings. It was then provided, "Whereas Arthur Champernowne hath agreed to become the purchaser of the manor, hereditaments, and premises at or for the sum of 70,000*l.*, upon the terms and conditions expressed and contained in the agreement of the 27th day of May 1811, so far as the same hath not been complied with; and whereas the abstract of title delivered to Charles Scott hath been handed over to, and the same is now in the hands of Arthur Champernowne;" it was witnessed and "declared, and agreed by and between

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in the bill of exceptions (to which we are referred by your Lordships); and also a case, purporting to be a case stated for the opinion of counsel, on the part of a former Bishop of M., and brought from the same custody; and whether such deed and such case were respectively admissible in evidence against the successors to the Bishop of M., in that see, are the first and second questions proposed to us by your Lordships.

With your Lordships' permission, we shall reverse the order of considering the two questions, and give our answer first to the question, whether the case was admissible in evidence; for as the deed and the case were found at the same time, by the same persons, at the same place, and, indeed, in the very same parcel of papers, the question of admissibility, so far as it depends on the custody, is precisely the same with respect to both. But a difficulty which might exist with respect to the deed, but which forms no ingredient in the consideration of the admissibility of the case, will be avoided if the case should be held to be receivable in evidence. And upon the question, whether the case stated for the opinion of counsel is admissible, the Judges who have heard the arguments of counsel on this point, are of opinion, that it would be admissible in evidence on the trial of the *quare impedit* above supposed to be brought. For, although two of my learned brethren, Mr. Justice *Park* and Mr. Justice *Coleridge*, did at one time feel doubts as to the propriety of admitting such evidence, I am authorised by them to state, that upon further consideration, those doubts are removed, and that they agree in opinion with the rest of the Judges.

It is not necessary to determine on the present occasion whether the supposed plaintiff in the *quare im-*

Now, your Lordships will see what the provision was with respect to the payment of interest; 7,000 *l.* being provided to be paid as a deposit, bearing interest, 3,000 *l.* were paid beyond the specified deposit. It was provided that the vendors "shall receive from or be allowed interest by Hugh Hammersley and others upon the sum of 7,000 *l.*, part of the sum of 10,000 *l.*, at the rate of five per cent. per annum, from the 13th day of February last to the time of the completion of the purchase; and the said Arthur Champernowne shall in like manner receive from or be allowed interest by Hammersley and others upon 3,000 *l.* of the said sum of 10,000 *l.*, at the same rate and for the same period." So that instead of having to pay interest upon the purchase-money, and being entitled to the rent, it is stipulated that for the 3,000 *l.* over and above the deposit he should have interest. My Lords, one cannot feel much doubt of the effect of this contract, however injudicious it may have been, which has taken this case out of the ordinary rule that the vendor is entitled to the interest, and the purchaser to the rents of the estates. The parties here have thought proper to stipulate among themselves that the rents should be the property of the purchaser only from the time the purchase was completed, and interest on the 3,000 *l.* over-paid should be paid to the party paying it up to that time. There is nothing said in terms as to the interest on the rest of the purchase-money, but it necessarily follows, from the reservation of the rents to the vendor, that the purchaser was not to be called on to pay interest upon the purchase-money. With respect to the 3,000 *l.*, it is stipulated that interest shall be paid up to the time of the completion of the contract.

Now, my Lords, the parties never, till a very recent period, appear to have entertained any doubt

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on that being the nature of the contract between them. In a bill which was filed many years ago, for the purpose of carrying it into effect, it was alleged that the purchaser was induced to raise frivolous objections to the title on account of the great benefit he derived from postponing the final completion of the purchase, inasmuch as being a reversionary interest the rents bore but a small proportion to the interest of the purchase-money, and it was alleged that that was his reason for postponing the completion of the contract. The bill alleged "that the prospect of advantage to the purchaser arose from the dropping off of those lives, whilst the rents then actually receivable from the said estates were not nearly equal in amount to the interest of the purchase-money then remaining unpaid, and the interest which the purchaser was to be allowed upon the sums so paid by him as aforesaid; and that by reason thereof it was greatly for the advantage of the purchaser to protract the completion of the said purchase, and the vendors by their bill prayed that Arthur Champernowne might be decreed specifically to perform the agreement of the 11th day of December 1812, and to accept a conveyance of the estate and hereditaments, according to the draft conveyances in the said bill stated to have been prepared and approved of as in the bill mentioned, and that he might pay to Nowell the sum of 32,492 *l.* 18 *s.* 1 *d.*, together with interest thereon, from the 4th day of July 1816," that being the day on which, according to the statement in the bill, the title had been made out and perfected; and the plaintiffs, by their bill, offered to allow interest upon the sums of 3,000 *l.* and 15,000 *l.*, paid in part of the purchase-money, up to the time of the payment of the residue of the said purchase-money. The plaintiffs never alleged in their bill the claim which they have since by this appeal thought fit to

bring before your Lordships; they were content to put this construction upon the contract, which it obviously bears, that the vendors were to have the rents until the contract was completed, which must mean until such time as by their contract it ought to be completed, so far at least as they were concerned. If the purchaser has improperly delayed the completion of the contract to gain this improper advantage, that is a matter for the Court to set right in the progress of the cause. The question now at the bar is, whether the decree of 1821 took a correct view of the conduct of the parties.

My Lords, the decree of 1821 took precisely the same view as the parties themselves took, for it directed the Master to inquire "whether any of the persons for whose lives any part of the estate and premises comprised in the said contract were held on the 29th of September 1811 had died since that time; and whether any arrangements binding upon the representatives of Arthur Champernowne, the elder, deceased, was come to in his lifetime with respect to the payments to be made by the said Arthur Champernowne, the elder, deceased, on account of the lives which had so dropped, or any of them; and it was thereby further ordered, that the Master should also inquire and state how much the value of the estate and premises had been increased by the deaths of such persons." Now, that is consistent with the view of the contract taken by the parties at that time. The vendors however now say, "they are entitled to take not only such increased value as may have accrued from the dropping of lives, but the increased value which may have accrued from the wearing of lives, and inasmuch as an estate granted on lives is much more valuable in 1837 than in 1812, we have a right to have that value added to the purchase-money,

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ably be expected to be found; and that is precisely the custody which gives authenticity to documents found within it; for it is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody, there never would be any question as to their authenticity; but it is when documents are found in other than the proper place of deposit that the investigation commences, whether it was reasonable and natural, under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious, that whilst there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable, though differing in degree, some being more so, some less; and in those cases, the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine.

That such is the character and description of the custody which is held sufficiently genuine to render a document admissible appears from all the cases. On the one hand, old grants to abbeys have been rejected as evidence of private rights, where the possession of them has appeared altogether unconnected with the persons who had an interest in the estate. Thus, a manuscript found in the Herald's Office enumerating the possessions of the dissolved monastery of *Tutbury*, *Lygon v. Strutt* (y); a manuscript found in the *Bodleian Library* at *Oxford*, *Mitchell v. Rabbetts*, cited in *Swinerton v. Marquis of Stafford* (z); an old grant to a priory brought from

(y) 2 Anstr. 601.

(z) 3 Taunt. 91.

interest, and the contract equally excludes that benefit which the party appealing seeks to have from the increased value by the wearing of lives. The decree gives all the benefit which the contract gives; it directs the Master to inquire what has been the increased value from the dropping of lives; it is silent as to interest and as to any increased value from the wearing of lives. That is the decree appealed from, and that is the only point to which your Lordships' attention can be drawn; because, though there have been various proceedings in the cause which are not now under your Lordships' consideration, in which these questions have been attempted to be collaterally raised, they have failed, and failed in some instances, as appears by the papers, because the Court was of opinion that the mode in which the claim was made was not the proper mode of bringing the claim before it, and that is the occasion probably of the party having appealed at so late a period from the decree of 1821. Your Lordships have only to look at the decree of 1821, and to see whether that decree does properly carry out the contract between the parties, and give them everything to which they are entitled. I am clearly of opinion that that is the case; and that an appeal from a decree pronounced so long ago, is one which you will not feel inclined to favour. I should certainly therefore have considered that this appeal from the decree of 1821 was one which your Lordships would feel it right to visit with costs, but there does appear to have fallen enough from the Court in the progress of the cause to encourage the party to try this experiment. I shall therefore propose to your Lordships to affirm the decree without costs.

Decree affirmed.

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A P P E A L

FROM THE COURT OF CHANCERY.

The Directors of the EAST INDIA COMPANY *Appellants*.

JOHN CAMPION, DAVID COLVIN, WIL-
 LIAM CRAWFORD, and JAMES GA- } *Respondents*.
 THORNE REMINGTON - - - - -

*Bill of Inter-
 pleader.
 Jurisdiction.*

The Directors of the *E. I. Company* having in their hands the sum of 5,577 *l.* arising from the sale of goods consigned to *B. & Co.* on which *C.*, owner of the ship on board of which the goods had been brought into the *E. I. Company's* docks, claimed to have a *lien* for freight, paid 2,000 *l.*, part of said sum, to *B. & Co.* on account, and 849 *l.* to *C.* An action having been afterwards brought by *C.* for 1,908 *l.* the residue of his claim, and *B. & Co.* having threatened an action for the whole balance remaining in the Directors' hands, the latter filed a bill of interpleader against *C.* and *B. & Co.*, and paying that balance into Court, obtained an injunction to restrain the proceedings at law. The cause was heard and a decree pronounced, directing an issue to be tried at law between *C.* and *B. & Co.*, in which *C.* ultimately established his claim, the Directors taking no part in that proceeding. The sum paid into Court being insufficient to answer *C.'s* claim with the interest that had accrued thereon during a protracted litigation, the Directors were ordered, on the hearing of the cause on further directions, to pay into Court, as subject to *C.'s* lien, the 2,000 *l.* which they had already paid to *B. & Co.* HELD, by the House of Lords, that this latter order was inconsistent with the principles of an interpleader suit; that the plaintiffs in that suit having paid into Court under its order the whole sum which was the subject of interpleader were discharged from further obligation; that the protracted litigation which increased the claim of

one of the conflicting defendants beyond the sum in Court, being caused not by the plaintiffs, but by the other conflicting defendants, who were parties to the appeal, and the money being paid to them, and never having been the subject of the interpleader suit, they were the parties really liable to satisfy the claim established by C., with costs.

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THE Respondent, *Campion*, was the managing owner of a merchant ship, called "*Hero*," in the year 1816, and by a charter-party, dated the 18th of November in that year, he chartered her to *John Burton Gooch*, of *London*, merchant, for a voyage from *London* to *Madeira*, and thence to *Madras* and *Calcutta* in the *East Indies*, and back again from *Calcutta* to *London*, at the rate of 14 *l.* per registered ton, with 2 *l.* 10 *s.* per cent. primage on the amount of the freight; 500 *l.*, part of the freight, to be paid in cash, at the expiration of six months from the date of the charter-party; one moiety of the remainder, by approved bill or bills, payable in *London* at two months from the day of the ship's arrival in the river *Thames* on her homeward voyage, and the residue by a like bill or bills, payable in *London* at four months' date from the same period. *Gooch* accordingly shipped sundry goods and merchandize on board the "*Hero*," consigned to Messrs. *Colvin & Co.* of *Calcutta*, as his agents, and he directed them either to make a return cargo, or send the ship home on freight, and in either case to consign the same to the Firm of *Bazett, Farquhar, Crawford & Co.*, merchants in *London*. That firm then consisted of the other Respondents *David Colvin*, *William Crawford*, and *James Gathorne Remington*; and also of *Richard Campbell Bazett* and *John Farquhar*, both since deceased, as the

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mentioned, which grant was made to the Bishop of *M.*, and is assumed to be in the same terms as that which is contained in the said appendix; and upon these latter documents your Lordships propose the two following questions; viz. "first, Did the Act of *Henry 7* avoid the said grant of *Edward 4*? And, secondly, Did the same statute re-append the advowson to the said manor whereto it was appendant before the grant?" And upon these questions we are of opinion, that the statute of *Henry 7* did avoid the said grant of *Edward 4*; and that it did also re-append the advowson to the said manor.

Several objections have been urged against holding the grant to fall within the operation of the statute. First, it is said that the statute revokes no grants made by any kings, except those who were the progenitors of *Henry 7*, in the strict sense of that word; and that *Edward 4* was not a progenitor of that king: secondly, that the statute does not extend to grants of which such progenitors were seised *jure privato* only, and that *Edward 4* was seised *jure privato* of the advowson in question: thirdly, that it does not extend to revoke grants to corporations, whether sole or aggregate: and, lastly, that it does not extend to any grants but those under the Great Seal, either of *England* or *Ireland*; and that the grant of the advowson in question is made under neither.

Upon these several objections we shall observe in their order. As to the first objection, if the term "progenitors" is to be understood in its literal sense, then the only King of *England* who, since the last year of *Edward 2*, was a progenitor of *Henry 7*, would be *Edward 3*, for *Henry 6* was no progenitor in the strict sense of the word; but, as he is expressly named in the preamble to the statute, 19 *Hen. 7*, c. 18, he

wool were directed to be appropriated to the credit of *Gooch*; and in another letter from the same to the same, dated 4th October 1817, and enclosing the policies on the homeward cargo, *Colvin & Co.* stated, that for *Gooch's* own goods they had not considered it necessary to draw freight bills. On the arrival of the ship in London *Bazett & Co.* claimed to be entitled to the cotton wool by virtue of the bills of lading, and on the 18th of *May* 1818, they caused a notice in writing to be delivered to the Appellants' secretary on their behalf, as follows: "Sir, understanding that you have received a letter from Mr. *John Campion*, who, as the owner of the "*Hero*" (Captain *Price*), from *Calcutta*, requests you to withhold payment of the proceeds of the cargo of that ship, committed by the consignees to the care of the Honourable *East India Company* for sale, until he is satisfied for the freight, amounting to 5,605 *l.* 5 *s.*, we beg to apprise you that we hold the bills drawn for the freight of this cargo, and annex you a list thereof, with the particulars of the goods for which the bills of lading were signed by Captain *Price*, freight for the goods being paid by bills, amounting in the whole to 2,644 *l.* 1 *s.* 10 *d.*, which, as far as it goes, will, we believe, correspond with a list annexed to the letter to you, signed by Mr. *Campion*. There are all landed from this ship to our consignment I. B. G. 489 bales, 22 half bales cotton wool, I. B. G. B. F. C. & Co., safflower, 21 bales safflower, for the freight of which no bills have been drawn, and the proceeds of which we conceive will be much more than sufficient to cover the deficit of the sum claimed by Mr. *Campion*, beyond the amount claimed in the annexed list. These proceeds we are willing should be retained by you, as well as request you to retain the several sums in the annexed list,

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the express words of the statute; independently of which, the sale of the next presentation, or the sale of the advowsons themselves, made them the possible source of profit to the Crown. And whether the advowson in question, supposing there had been no grant by *Edward 4*, would have devolved upon *Henry 7*, as parcel of the possessions of the Crown; or whether he would have taken it in right of his wife by descent to her and his marriage; in either case the advowson would have been valuable to him, though perhaps to a different extent upon the two suppositions. It seems, therefore, to become unnecessary to determine whether, on the facts stated in the bill of exceptions, this advowson was the property of *Edward 4* in right of his crown or not. But it appears to follow, from the decision of the case of the Duchy of *Lancaster*, in *Plowden*, and by what is said by Lord Chief Justice *Holt*, in the banker's case (*e*), that whatever belonged to *Edward 4* before he came to the throne, on his accession to the Crown belonged to him *jure coronæ* in his politic capacity, and not in his private, and as such it would descend to *Edward 5*, be transferred to *Richard 3* on his accession to the Crown, and in like manner devolve on *Henry 7*. In this respect, therefore, the Earldom of *March*, and all the lands and tenements belonging to it, would be precisely on the same footing as the Duchy of *Lancaster* would have been, but for the charter of *Henry 4*, confirmed by Parliament, which, according to the doctrine laid down by the Judges, would have been otherwise annexed to the Crown (*Plowden's Rep.* 204).

As to the third objection, that the statute extends only to the case of grants to private persons, and does not include those to corporations, either sole or aggre-

(*e*) *Skinner*, 603.

on account thereof, and in August 1821 they, with consent of that firm, paid *Campion* 849 *l.* 5 *s.* 10 *d.*; and that after such respective payments, the sum of 2,585 *l.* 0 *s.* 10 *d.*, remained as a balance in the hands of the Appellants, which they were ready to pay to the party entitled thereto, and that *Bazett & Co.*, as such co-partners and consignees as aforesaid, claimed to be entitled to the same, and that *Campion*, as owner of the said ship, claimed to be entitled to the sum of 1,908 *l.* 3 *s.* 9 *d.* part thereof, together with interest from the delivery of the cargo of the said ship to the Appellants, in the year 1818, and that the assignees of *Gooch* claimed to be interested in the said balance, which the Appellants were ready and willing to pay, but that they, by reason of the said several and opposite claims of the defendants, were unable to ascertain to which of them the said sum of 2,585 *l.* 0 *s.* 10 *d.* of right belonged. The bill prayed that all the defendants thereto might answer the matters therein mentioned, and might interplead and settle their said claims and demands amongst themselves, the Appellants thereby offering to pay the said sum of 2,585 *l.* 0 *s.* 10 *d.* to such of the said defendants as should appear to be entitled thereto, and to bring such sum into court, subject to further order, and that *Campion* might be restrained by the order of the Court from further proceeding in the action at law, then already commenced by him against the Appellants as aforesaid, and from all other proceedings at law against the Appellants touching the matters in the bill mentioned, and that the said other defendants might be respectively restrained by like order from all proceedings at law against the Appellants touching the said sum.

The Respondent *Campion*, by his answer to the said

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grant was originally under the Great Seal in either country. It is further alleged, that by 4 *Henry 7*, c. 14 (*English Act*), it is expressly recited, that in *Edward 4th's* time, all grants of property parcel of the Earldom of *March* were made under a special seal, called "seal of the Marches;" and that, for redress of mischiefs ensuing thereupon, it is by that statute enacted, that for the future all such grants shall be made under the Great Seal. Now, looking at and examining the grant in question, it appears upon the face of it to relate to a subject matter which the King held as Lord of *Ireland*, and granted as such. No allusion is made to any individual or particular character, but the King grants with the assent, substantially, of the Lord Lieutenant, who, as such, would have nothing to do but with the property of the King, held *jure coronæ*. Further, the grant is made with a *non obstante* of any statute, act, or ordinance to the contrary; a clause which the King, granting merely as Earl of *March*, never would assume to have power to add. The teste also is from the year of the reign, a circumstance which would rather indicate the grant to have been made by the King *jure coronæ*, than the contrary. This inference, arising upon the face of the grant itself, is confirmed by the acknowledged principle of law, that upon the accession of *Edward 4* to the Crown, his possessions as Earl of *March* would become annexed, in point of government and administration, at least, to the possessions of the Crown. The authority of the Judges in the case of the Duchy of *Lancaster* (*f*), is precisely to the point. Speaking of the mode of passing land held by the King *jure coronæ*, by letters patent only, without livery of seisin, they add, "so it has been the practice

after said payments there remained in the hands of Appellants the net sum of 2,585*l.* 0*s.* 10*d.*, as the balance of the proceeds of the said cotton wool. And these defendants, by their said answer, further said, that *Gooch*, after hiring and despatching the said ship with her cargo on her outward-bound voyage, in 1818, applied to them to lend him money, which they consented to do, upon having the repayment thereof, and also such other monies as he, *Gooch*, was indebted to them in, with interest, secured to them upon his investment in the said ship, and they said that they had advanced to him (he consenting they should hold the proceeds of the said adventure, as a security) the sum of 6,000*l.* and upwards, and that Messrs. *Colvin & Co.* received the said outward cargo, and sold the same in *India*, and being unable to procure a full freight home for the said ship, on such terms as they deemed for the advantage of *Gooch*, they invested the net proceeds of the sale thereof as far as the same would extend, together with other monies of their own, in the purchase of the 489 bales and 22 half bales of cotton wool, which they caused to be put on board the said ship, consigned to them (*Bazett & Co.*), and that bills of lading for the same were duly made and signed by the master of the said ship, by which the said cotton wool was to be delivered to them, or their assigns, upon payment of freight, which amounted to the sum of 849*l.* 5*s.* 10*d.* And these defendants, by their said answer, said, that Messrs. *Colvin & Co.* advanced considerable sums of money to *Gooch*, or on his account, in the purchase and shipment of the said homeward cargo, and that for the repayment thereof Messrs. *Colvin & Co.*, having the said cargo, and certain bills of exchange thereafter mentioned, in their hands, were entitled

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to a lien thereon, subject only to the lien of these defendants; and that the said cotton wool and bills of exchange were consigned by *Colvin & Co.* to these defendants, as their agents, for the purpose of keeping secured to them the payment of their said debt, by their lien on the said property. And these defendants were informed and believed that the said ship was put up by *Colvin & Co.* as a general ship to take goods for England, and goods were accordingly shipped on board of her, and bills of exchange for freight thereof were drawn by the shippers, and delivered to *Colvin & Co.*, and by them remitted to these defendants to the amount, in the whole, of 2,644*l.* 1*s.* 10*d.* And when these defendants received the said bills of exchange and the bills of lading of the cotton wool, they at the same time received notice from *Colvin & Co.* of their said lien, and of their right to be paid out of the proceeds thereof what was due to them by *Gooch*; and these defendants, in fact, held the bills of exchange and bills of lading as the agents of *Colvin & Co.*, and they said they believed that the sum of 500*l.*, which it was agreed by the charter-party of the "*Hero*" should be paid to *Campion* at the time therein mentioned, was paid to him about that time, and before the arrival of the said ship; and that the said sum of 849*l.* 5*s.* 10*d.* which, as was therein mentioned, was the freight upon the said cotton wool, had also been paid to him out of the proceeds of the sale thereof by the Appellants, and they said that they consented to such payment, believing that the balance of the said sum of 5,434*l.* 6*s.* 8*d.*, which would remain in the hands of the Appellants, after payment of the said sums of 849*l.* 5*s.* 10*d.* to *Campion* and 2,000*l.* to themselves, would be sufficient for securing the repayment to

them of the balance, which would be eventually due to them and to *Colvin & Co.* in respect of the aforesaid transactions; and these defendants submitted, that if *Campion* had any lien at any time on the said cotton wool, it did not exceed the sum of 849*l.* 5*s.* 10*d.* which had been paid to him for the freight thereof.

The assignees of *Gooch*, by their answer, disclaimed all interest in the cotton wool, and the bill was afterwards dismissed as against them with costs.

By an order made in the cause, on the application of the Appellants, dated the 24th *July* 1823, it was ordered that they should be at liberty to pay into the Bank, in the name of the Accountant-general, to the credit of the cause, the said sum of 2,585*l.* 0*s.* 10*d.*; and such sum was accordingly paid in, and the same was, in pursuance of a subsequent order obtained by *Campion* in December 1824, invested in the purchase of 2,718*l.* 14*s.* 5*d.* 3 *per cent.* Consolidated Bank Annuities, the dividends whereof were from time to time laid out in the purchase of like annuities. By another order, bearing date the 31st of *January* 1824, and made on the motion of the Appellants, the Respondent *Campion* was restrained by injunction from all further proceedings in the action at law against the Appellants until further order.

The cause came on to be heard before the *Vice-Chancellor* on the 17th of *April* 1826, and by decree of that date it was ordered that the parties should proceed to a trial at law on the following issue, (that is), whether *Campion* and his partners, or any of them, as owners of the ship "*Hero*," had a lien on the 489 bales and 22 half bales of cotton wool in the pleadings mentioned, for freight, beyond the freight due in respect of the said cotton wool, and in such issue *Campion* was to be plaintiff, and *Colvin, Craw-*

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is tendered in evidence, levied by *B.*, whose estate *C.* hath, which fine is set forth in the pleadings to which we are referred, your Lordships propose the three following questions: viz.

“ *First.* Whether such fine was admissible in evidence under any of the said issues?

“ *Secondly.* Whether, if received, it ought to be left to the jury to say whether it barred the action of *quare impedit*? and,

“ *Thirdly.* Whether the fine did bar the action of *quare impedit*? ”

The fine in question is stated to have been levied in Trinity term, 1 *James 2*, by *William*, seventh Earl of *Clanricarde*, and *Hester* his wife, to *John Brown*, *Gerald Dillon*, and *Anthony Mulledy*, and the heirs of the said *John Brown*, of the manors of *Rathweir* and *Killucan*, with the appurtenances, and divers quantities of land therein specified, and also of the advowson and right of patronage of the parish of *Killucan*. And in answer to the first of the questions proposed by your Lordships, we are of opinion that the fine, upon the state of pleadings on the record, was not admissible in evidence under any of the issues joined therein. There are only these issues upon which there can be any ground whatever to contend that the fine was admissible: the issue taken upon the traverse by the Bishop in his twelfth plea (which is precisely the same in terms as the issue taken by the Clerk in his eighth plea), and the issue taken upon the traverse by the Clerk in his fifth and seventh pleas, all the remaining issues being raised on single points quite unconnected with, and altogether unaffected by, the fine. The traverse of the Bishop is in these terms:—
 “ Without this, that the plaintiff below is possessed of the said advowson of the said church of *Killucan*,

motion was made before the Lord Chancellor (Lord *Brougham*) on behalf of the Respondents, the defendants to the action, to discharge the last-mentioned order of the Vice-Chancellor, which motion his Lordship, by an order then made, refused, with costs.

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On the 15th of *February* 1832, the cause came to be heard for further directions before the then Master of the Rolls. The sum of 3,251 *l.* 0 *s.* 10 *d.* in the Three per Cent. Consols, and 48 *l.* 15 *s.* 4 *d.* in cash, being the amount, of the money brought into Court, together with the accumulations thereof, after payment of the costs of the Appellants and of the assignees of *Gooch*, remained in Court to the credit of the cause. After a full hearing it was ordered that it should be referred to the Master to take an account of what was due to the Respondent *Campion*, under and by virtue of the charter-party, and that the Master should compute interest at *five per cent. per annum*, from the 1st *September* 1818, being four months from the day of the arrival of the said ship in the river *Thames*, and being the time when the bills of exchange to have been drawn for the amount would have been due; and it was ordered that the said sum of 3,125 *l.* 0 *s.* 10 *d.* *Three per Cent. Annuities* should be sold, and out of the money to arise by the sale, and the said sum of 48 *l.* 15 *s.* 4 *d.* cash, that what the Master should find due to the Respondent *Campion* should be paid to him, and in case the money to arise from the said sale, and the said cash should be insufficient to pay the amount found due, then it was ordered that the whole of the money arising from the sale of the said Bank Annuities, and the said cash should be paid to him, and that the deficiency should be paid by the other Respondents out of the sum of 2,000 *l.* received by them out of the proceeds of the sale of the cotton wool.

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plaintiff became and still is possessed of the said advowson as of an advowson in gross for the remainder of the said term so theretofore granted." This is the allegation, and the only allegation, in the count, to which the traverse can possibly apply. And as the traverse is taken upon the precise terms of this allegation, one ground upon which the fine may be held to be inadmissible is, that the traverse is confined to the possession of the plaintiff by reason of the term for years, and of his surviving his co-joint-tenant in the term; such being the fair and natural import of the allegation made by the plaintiff. It is unnecessary to say that if such be the proper construction of the traverse, the fine is altogether inadmissible.

But admitting, for the purpose of the argument, that the averment in the declaration takes a wider range, and that it amounts to an allegation, that, by reason of all the various steps in the title of the plaintiff, which are set out in the fifth count of the declaration, the plaintiff is possessed of the right to the advowson, and admitting the traverse to be equally extensive, and to put all those steps of the title in issue, still we think, by analogy to the rules of pleading, the utmost effect that can be given to such a traverse is, that it is a simple denial of the different allegations of the descent, and of the other steps of the title, so as thereby to put the plaintiff to the proof of his whole declaration; but that the traverse will not admit of new and affirmative evidence on the part of the defendant, taking the title out of the plaintiff, and vesting it in another person.

The general principle of pleading is, that the defendant must either deny, or he must confess and avoid the charge in the declaration; the same plea cannot do both. But supposing this traverse to have the

was heard in 1834, and by an order of this House, made on the 12th of *August* in that year, the said order of the 18th of *January* 1832, and the said decree of the 15th of *February* 1832, were reversed, and so much of the said order of the 30th of *July* 1831 as discharged the former order, directing that the said parties should proceed to a new trial, was discharged, and it was ordered that the said parties should proceed forthwith to a new trial of the issue; and all other parts of the said order of the 30th of *July* 1831 were affirmed. And it was further ordered that the Respondent, *Campion*, should have liberty to apply to the Court of Chancery for payment into Court of the said sum of 2,000 *l.*, or any part thereof, in case the other Respondents, *Colvin*, *Crawford* and *Remington*, who were the Appellants in that appeal, should delay proceeding to such new trial (a).

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(a) COLVIN and others v. CAMPION : House of Lords, August 12, 1834.—Lord *Brougham*, Chancellor, in moving the House to make the above order, said, “ This is an appeal from my decision in the Court of Chancery, a decision by which I discharged an order of his Honor the late Vice-Chancellor (Sir *Anthony Hart*), but also affirmed an order of his Honor, the present Vice-Chancellor, which order had discharged the order of Sir *Anthony Hart*. That order consisted of three parts, the first, granting a new trial of an issue which was unsatisfactorily tried in the opinion of that learned and experienced Judge; the second, issuing a commission for the examination of witnesses in the *East Indies*, and the third, staying proceedings in the new trial until the return of the commission. All these parts of that order were reversed by the present Vice-Chancellor, and I, on their coming before me on appeal, affirmed, after much consideration, the order of his Honor, discharging the order of Sir *Anthony Hart*. Upon further reflection, however, upon the case, and for the reasons stated during the arguments before your Lordships, I have been induced to come to the conclusion that the present Vice-Chancellor and myself were wrong in discharging the whole of the three parts of the order of Sir *Anthony Hart*, and therefore I shall now move your Lordships to reverse so much of the order of the Court below as discharged the order of Sir *Anthony Hart* for a new trial of the issue, but affirming the residue of the order of the Court of Chancery, which affirmed the

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more than a precise denial taken by the defendant of the last words in the plaintiff's declaration; viz. "and for that reason it now belongs to the said plaintiff to present a fit person to the said last-mentioned church." It is a mere inference of law, resulting from all the facts stated in the count, and altogether unlike the traverse in the case of the *Grocers' Company v. The Archbishop of Canterbury* (h), which included a matter of fact material to the right. But taking it to be a traverse of all the steps, by which the title to the advowson is deduced to the plaintiff from *Richard*, the fourth earl, who is averred to have been first seised in fee, the same objection applies to the admissibility of the fine in evidence under this traverse, as under that to the Bishop's twelfth plea; and the same observation may also be made with respect to the issue on the fifth plea as to the seisin of *Michael*, the tenth earl. And besides, there is another reason why, under the traverses in the fifth, seventh, and eighth of the Clerk's pleas, the evidence of the fine should not be admitted, though the same reason does not exist as to the traverse in the twelfth plea of the Bishop, in which he claims to present as patron.

It is clearly established that neither the clerk nor ordinary, in that character, could counterplead the plaintiff's title at common law, for neither of them had any interest in the patronage; and under the statute 25 *Edward 3*, stat. 3, c. 7, the incumbent (as possessor when presented and instituted) could not counterplead the plaintiff's title, without maintaining his own title and that of his patron, on which his own depends. This is distinctly laid down by Lord *Hobart*, in the case of *Elvis v. The Archbishop of Canterbury* (i), for the statute only allows the pos-

(h) 3 Wils. 214.

(i) Hob. 315.

September 1818, being the time when the bills of exchange in the pleadings mentioned, as agreed to be given, would have been due; and the Master, in taking such account, was to give credit for the sum of 2,755 *l.* 5 *s.* 2 *d.* paid to *Campion*, pursuant to the order of the 25th of *April* 1832, at the time when received, and he was to be at liberty to adopt the account taken in pursuance of the decree made on the hearing of the said cause for further directions, dated the 15th of *February* 1832; and it was ordered that it should be referred to the said Master to tax *Campion* his costs at law, and of the said suit, including the costs of the order and decree reversed by this House, and that such costs, when taxed, should be paid by *Colvin, Crawford* and *Remington*; and it was declared that in case any balance should be found due to *Campion* on the said account, he had a lien for the amount thereof on the sum of 2,000 *l.* in the pleadings mentioned; and it was ordered that the Appellants should pay into the Bank, with the privity of the Accountant-General, to be there placed to the credit of the said cause, subject to the further order of the Court, the sum of 2,000 *l.*; but that was to be without prejudice to any question of interest, or lien on the interest of the said sum of 2,000 *l.*, and *Campion* was to be at liberty to apply to the Court respecting the interest of the said 2,000 *l.*, as he might be advised.

The Appellants, not having appeared at that hearing, applied to the Vice-Chancellor for a rehearing; his Honor granted their application, and, after hearing the cause re-argued on the 23d of *July* 1836, he confirmed the said order, and the same was passed and entered as an order of that date.

The Appellants presented a petition of appeal to

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received in evidence, absolutely of itself bar the action of *quare impedit*. It could not do so, on the ground of estoppel, because the parties to this suit did not both claim respectively under the parties to the fine, and the fine is an estoppel only between parties and privies; and though it operates as a conveyance from Earl *William*, the seventh earl, to *Brown*, *Dillon*, and *Mulledy*, for a valuable consideration, it is possible that this was a conveyance by way of mortgage, which has been paid off, or that these parties might have reconveyed the advowson to Earl *William*, or some some subsequent earl; and there is even some evidence stated in the bill of exceptions to raise a presumption that it was so, for in 1699 Earl *Rickard* conveyed to *John Morgan*, and in 1744 *John Morgan* reconveyed the advowson to Earl *John Smith*; and there is no evidence of any dealing with the advowson or presentation by the conusees of the fine, or any one claiming under them. It cannot, therefore, be said, that the fine alone, if it had been admissible, was an absolute bar to the action, which is the last question proposed by your Lordships.

August 1.

The *Earl of Devon*, after stating shortly the proceedings that were had, said he concurred in the unanimous opinion of the learned Judges, and he therefore moved that the judgment of the Court below be affirmed, with costs, as on every point the defendant in error had been in the right.

The judgment was affirmed, with costs.

after they obtained the original decree in *April* 1826. When a decree is made in an interpleader suit, and a trial at law is directed between the defendants, the suit is ended as regards the plaintiffs, and they have no more to do with it: *Anonym.* (b); *Mitford's Pleadings*, 142; *Jennings v. Nugent* (c).

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But even if, consistently with regularity of proceeding and the practice of the Court, it was competent to the Court to give any relief touching the sum of 2,000 *l.*, that relief ought to have been given against the Respondents, *Bazett* and his partners, who by their answer admitted that they had received that sum from the Appellants. *Campion* in his answer did not claim that sum; he acquiesced in the payment of it to *Bazett & Co.*, but denied that he had consented to such payment. The Appellants say he did consent; and whether he did or not, is a question which ought to be tried by a jury. That question did not form an issue in the cause. The fact of consent has not been, nor could be, either proved or disproved therein; and this is a question which *Campion*, even upon the assumption that the payment was made without his consent, ought now to be precluded from raising, after having suffered so long a period to elapse without taking any effective steps, by cross-bill or otherwise, with a view to obtain any relief against the Appellants.

All the proceedings had in the cause, since the original decree of *April* 1826, including the trials at law, were taken in the absence of the Appellants, and without their intervention or privity. The decree on further directions was expressed to be made, and was in fact made, on the footing of a verdict given upon

(b) 1 Vern. 357.

(c) 1 Molloy, 134.

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supplementary papers for the purpose of our appeal.

Mr. *Pemberton* submitted that the Appellants should be put under terms.

The *Lord Chancellor* :—Let the hearing be put off to the 6th of June. Let the Appellants, within a fortnight from this day, specify the points on which they mean to insist, and also print a supplemental paper, showing the same, and pay the Respondent his costs of the day.

An order was made to that effect.

On the 6th of June counsel were called in, and no counsel or agent appearing for the Appellants, Mr. *Crawford*, counsel for the Respondent, read the said order of the 2d of May, and prayed a dismissal of the appeal for want of prosecution, and an affirmance of the decree and order appealed from, with costs.

Lord *Brougham* was inclined to think that the proper course for the Respondent, under the circumstances, was to present a petition to the House to dismiss the appeal for want of prosecution. The House would refer that petition to the Appeal Committee, who might hear what the agent had to say, and report accordingly (*a*).

(*a*) In *Gardiner v. Simmons*, ante, vol. 1, p. 35, the House, under similar circumstances, dismissed the appeal without hearing any argument from the respondent's counsel, and indeed without his going through the form of moving the affirmance of the judgment. In *Mellish v. Richardson*, id. 225, the counsel for the defendant in error was directed to proceed with the argument. In *Ricketts v. Lewis*, ante, vol. 2, p. 100, the judgment of the Court below was affirmed without argument, but in *Fraser v. Gordon*, ante, vol. 3, p. 718, the respondent's counsel was called on to make out a *prima facie* case.

interpleader, and obtaining the injunction. The character of that proceeding cannot be affected, nor can it afterwards become liable to be objected to as an improper course with respect to either of the adverse claimants, by the ultimate issue of the litigation between them. The decree, or that part of it now complained of, is unprecedented, and not maintainable by any principle hitherto recognised in courts of equity in interpleading suits. The injustice and hardship to which the Appellants must be exposed, if the principle adopted by the Court below in the present case be sanctioned, show the expediency and necessity of adhering to those established rules, which have hitherto strictly confined the proceedings in an interpleading suit to the subject of interpleader.

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Mr. *Knight* and Mr. *Wigram* for the Respondent *Campion*.

The petition of appeal was served on the surviving partners of the firm of *Bazett & Co.*, and they put in their answers, but do not appear now to support their case, which leaves room to suspect that they are the real Appellants. If the East India Company did not obtain an indemnity from them when they paid over the 2,000 *l.* it was their own neglect, not to be visited on Mr. *Campion*, whose anxious wish it has been to fix *Bazett & Co.* Mr. *Campion* had a lien on the whole of the proceeds of the cotton wool for the whole of the freight due to him (beyond the freight of the cotton wool itself), and for interest upon such freight, and the Appellants having notice of such lien were not justified in paying over any part of the proceeds to *Bazett & Co.* without the consent of Mr. *Campion*. It was untruly stated in their bill of interpleader that

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May 2.
June 8.

APPEAL

FROM THE COURT OF CHANCERY IN IRELAND.

CHARLES RAYMOND DE BURGH, Esq. - *Appellant.*MARIA CLARKE, Widow, and Others - *Respondents.**Practice.
Time for
Appealing.*

By the standing order of the House of Lords of the 24th of March 1726 (No. 118), as amended in 1829, no petition of appeal from any decree or sentence of any court of equity in England or Ireland, shall be received by the House after two years from the enrolling of the same, and the end of the next session ensuing the said two years, unless the person entitled to such appeal be under the age of 21 years, or covert, *non compos mentis*, imprisoned, or out of Great Britain or Ireland, in which case such person may bring his appeal within two years after such disability ceased, and the end of the next session of Parliament ensuing the two years, but in no case shall any person be allowed a longer time, on account of mere absence, to lodge an appeal, than five years from the date of the last decree or order appealed against.

Held, therefore, by the House of Lords (confirming the decision of the Appeal Committee), that an appeal lodged the 18th of February 1836, against a decree dated the 26th of April, and enrolled the 14th of June 1832, was irregular, as not being within time, although the appellant had been absent abroad in consequence of embarrassment and illness of his wife, and was advised and believed he might appeal at any time within five years from the date of the enrolment of the decree, and although his appeal had been received and appointed for hearing.

Held, however, that the said appeal was saved by being extended to subsequent orders in the same cause, the appeal from these orders being brought within two years from the enrolling of them.

the instance of the party against whom the relief is sought. That proposition is broadly laid down in some of the cases. The case in which the Court would not relieve the obligor, though the interest went beyond the penalty of a bond, still strikes me as a very strong case (*f*). If the plaintiff submitted to nothing, by the mere circumstance of filing the bill, he would be taken to submit to everything conscience and justice require. Upon that principle he would be held to do that which is just; and the Court duly acting with him, would compel him to pay the principal, interest, and costs occasioned by his delay. It may be said that it is a relief given against a plaintiff coming for relief," &c. "A court of law always takes care that a creditor so prevented shall be put in the same situation as if he had his judgment and no such application had been made; and I rather think in every instance of an application for an injunction, it is the duty of the Court to consider whether the party ought not to have the benefit of his judgment, and if the Court decides wrong I should be sorry if the Court had not the means of reinstating him." The principles stated in these observations were acted upon not only in *Grant v. Grant* (*g*), to which the Vice-Chancellor referred in his judgment now under appeal, but in several cases as well before as subsequently to *Pulteney v. Warren*, and they were all referred to in the late case of *Brown v. Newall* (*h*). They submitted that the order of the Vice-Chancellor was just and equitable, and trusted their Lordships would support it.

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(*f*) *Duvall v. Terrey*, Show. P. C. 15.

(*g*) 3 Sim. 340, and 3 Russ. 598.

(*h*) 2 Myl. & C. 558; see p. 568.

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the 23d of January 1833, and the subsequent orders. Mrs. *Clarke* put in her answer on the 21st of March 1836. The other Respondents did not answer, though peremptorily ordered to do so. Attested copies of the pleadings and proceedings were delivered in from the Court of Chancery in *Ireland* in April 1837. The appeal having been appointed for hearing this day (2d of May),

Mr. *Knight*, with whom was Mr. *J. H. Palmer*, for the Appellant, was proceeding to state his client's case, when

Mr. *Pemberton*, with whom was Mr. *Lynch*, for the Respondent, took preliminary objections to the hearing. The decree of 1832 was not on their Lordships' table, and the subsequent orders, which were also appealed against, were not enrolled. But his principal objection was, that the appeal against the decree was irregular, as not being brought within the time limited by the standing orders of the House; by one of which it is ordered that no appeal be received by this House after two years from the enrolling of the decree or sentence appealed against, and the end of the next session after the expiration of the two years. Their Lordships had very lately discussed that order in the case of *Brooke v. Champernowne* (a). There the appeal was heard, their Lordships holding, in the first place, that the objection ought not be heard at the bar after it had been over-ruled by the Appeal Committee; and secondly, that the amended order of 1829, abridging the period of appealing from five years, allowed by the standing order of *March*

(a) Page 247, *supra*.

remain in the hands of the *East India Company*, is a fact, with respect to which neither party raises any dispute. The *East India Company* having parted with so much of the proceeds of the goods, and having in their hands the further sum of 2,585 *l.*, the balance of money received by them on account of the goods, the contest arose whether that sum was payable to *Bazett & Co.*, or whether *Campion* had not a lien on it for the amount which he claimed to be due to him for freight.

It appears from *Campion's* answer that what he claimed for freight at the time when he put in the answer, was the sum of 1,746 *l.* 13 *s.* 8 *d.*, together with interest thereon from the time it became due, which was in the year 1818; he was entitled according to his own statement to 1,746 *l.*, together with interest upon that sum from the year 1818 to the year 1824, when the answer was put in. Now giving the utmost possible allowance for what would become due as interest in that interval, I see it is impossible that it should amount to the sum of 2,585 *l.*, which was the balance remaining in the hands of the *East India Company*. He stated only that he claimed to be entitled to the greatest part of the sum so remaining in the hands of the *East India Company*, and at the time when the *East India Company* held the stake, which was the subject-matter of the contest, *Bazett & Co.* made an objection to *Campion's* lien. Under these circumstances, the *East India Company*, finding themselves attacked by both parties, and not knowing to whom they ought to pay the money, exercised the right, to which any person under those circumstances is entitled, of coming into a court of equity, and stating that money or other property which he holds, being in contest, he is ready to

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allowed him after his return home to lodge his appeal. This appeal has been, in fact, received "by this House;" so that in this case, as in *Brooke v. Champenowne*, the objection comes too late.

The *Lord Chancellor* :—Suppose the appeal from the decree of 1832 to be regular before the House, the appeal from the subsequent orders is irregular, as they are not enrolled. If you abandon the appeal from them you may go on with your appeal from the decree, otherwise let them all come on together some future day, the Appellant paying the Respondent the costs of the day.

Mr. *Knight* :—We have no means of paying the costs of the day. I will go on with the appeal from the decree, if your Lordships think that, in case I may not succeed on that, there will be no difficulty afterwards in appealing from the subsequent orders.

Lord *Brougham* :—You may adopt that course. You have a right to appeal separately and successively from every one of the orders.

Mr. *Pemberton* :—That course would entail a great hardship on the Respondents, who are not more wealthy than the Appellant, by whose absence from Ireland they have been deprived of all benefit from their decree; besides, the decree is not before the House. It was the Appellant's duty to lodge it, and no reason being shown for his omission, his appeal ought to be dismissed with costs.

The *Lord Chancellor* :—We have searched for the decree and cannot find it. The appeal cannot be

evil has arisen, not from any fault of the *East India Company*, but from the protracted litigation of the party who ultimately turned out to have no right. No case has been cited at the bar, no case can be cited or found in which any such claim as this has been made, as against a party who instituted an interpleading suit, and deposited the subject-matter of contention in Court, and had good reason to suppose that by so doing he had relieved himself of the obligation. I am satisfied no such case can be cited, because it appears to me inconsistent with the first principles of the law of interpleader, and goes to nullify the objects, which courts of equity profess to have in view in exercising this jurisdiction, and because wherever we find an order upon any party to make good an ultimate loss, it is no where made against a party acting as the *East India Company* acted, but it is always made against the party who has been the cause of the litigation and of the loss. Accordingly, it appears that the order of the 15th of *February* 1832 (which was afterwards reversed, not on account of this provision, but because this House thought there ought to be further inquiry at law) directed the Master to take an account; and that the deficiency should be paid by *Bazett & Co.*, the other Respondents, out of the sum of 2,000 *l.* received by them out of the proceeds of the sale of the consigned goods; another instance, showing that the 2,000 *l.* had passed from the possession of the *East India Company*, and was admitted to have been received by the firm of *Bazett & Co.*

Upon this money being paid into Court, *Campion* applied to have it laid out at interest, and the matter in contest (which constitutes the loss which *Campion*, if he has not a remedy elsewhere, will ultimately sustain)

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prayed for a declaration of their Lordships that his appeal was lodged within the time limited by the standing orders of the House, or that, under all the circumstances of the case, their Lordships would allow him to proceed by his counsel to support his said appeal.

This petition was referred to the Appeal Committee, who, after hearing the agents of the parties, reported to the House that it was their opinion that the prayer of the petition ought not to be complied with, and the House confirmed the report.

Jan. 23, 1838. The Appellant afterwards enrolled the orders of 1833 and 1835, and appealed against them, and also against the decree of 1832, which being sufficient to bring the whole within the order of 1829, the hearing was fixed for this day, and counsel were called in; but none appearing for the Appellant, one counsel appeared for the Respondent, and prayed an affirmance of the decree and orders appealed from. The House, having had consideration of the same, ordered the appeal to be dismissed, with costs (*d*).

(*d*) *Hamilton v. Littlejohn*, ante, p. 20.

IN COMMITTEE OF PRIVILEGES.

June 6.
 July 15.

In the Matter of Lord DUFFERIN and CLANEBOYE's Claim to Vote at the ELECTIONS of Representative Peers for IRELAND.

Evidence. The Committee of Privileges, in claims to vote at the elections of Representative Peers for *Ireland*, may admit an entry in their Journals as evidence of limitations in a patent of peerage without requiring the production of the patent.

HANS, Lord Baron *Dufferin* and *Claneboye*, presented his petition claiming the right to vote at

beyond the money paid into Court, should receive from *Bazett & Co.*, not only the amount due at that time from them, but the amount of the subsequent interest and costs.

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When those orders came before this House for review in 1834, an order was pronounced directing the course to be adopted for further investigating the title of the parties at law, and that order contained this provision, namely, that *Campion* should have liberty to apply to the Court of Chancery for payment into Court of the sum of 2,000*l.*, in case the other Respondents should delay proceeding to a new trial. It is quite clear that the object of that provision was to secure to *Campion* the means of a speedy termination of the question between himself and *Bazett & Co.* It is also quite clear that that order was addressed to *Bazett & Co.* And it is an additional confirmation of the course which the Court adopted of looking to *Bazett & Co.* as the parties who were bound to pay whatever *Campion* was entitled to claim.

The result of the former litigation has been to establish the right of *Campion*, and undoubtedly it would be most unfortunate if he who has been for so many years kept out of his just rights by the claim set up, and the litigation following that claim on the part of *Bazett & Co.*, should not be indemnified. But it would be equally unfortunate if an innocent party should be required to make good these losses,—if the Directors of the Company, who have been driven by circumstances over which they had no control to the course which they adopted, and who have paid the money to *Bazett & Co.* in the manner which I have stated, should now be called upon to pay it over again, that money being in the hands of *Bazett & Co.*, and of course available for all those purposes for which

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April 25.

A P P E A L

FROM THE COURT OF EXCHEQUER IN EQUITY.

EDWARD LATIMER - - - - - *Appellant.*WILLIAM NEATE - - - - - *Respondent.**Practice.*
Production of
Deeds.

L. claimed to be lawful owner of divers goods and chattels in the visible user and enjoyment of the Duke of M. at his family mansion. N., a judgment creditor of the Duke, filed a bill against him and L., charging that bills of sale and assignments of the said goods and chattels were executed by the Duke to L. without consideration, and that they were void as against N., and praying a declaration to that effect, and offering to pay what, if anything, should be found due to L. on the security of the said goods. L., by his answer, admitted the bills of sale and assignments to be in his possession, and said they were executed to him for full consideration, and that the Duke had only the permissive, not the absolute use of the goods; and on a further answer he claimed to have an equitable lien on them for money advanced, and he set forth in a schedule abstracts of the bills of sale, &c.

HELD by the Lords (affirming an order made by the Court below before hearing), that N. was entitled to inspection of the bills of sale and assignments, on the grounds, first, that these instruments were only a mortgage security; and, secondly, that N. had a right to see if the abstracts corresponded with the originals, in order to ascertain what he would have to pay to L. in redeeming the mortgage.

THE Respondent filed his bill in the Court of Exchequer in 1835 against the Duke of *Marlborough* and the Appellant, stating, among other things, that

that the decree ought to be altered by omitting that portion of it, directing the *East India Company* to pay 2,000 *l.*, it leaves the right to Mr. *Campion* not only untouched as between him and *Bazett & Co.*, but it leaves standing on the face of that decree a declaration which would be found quite sufficient to enable him to get that relief to which he is entitled. The case of *Pulteney v. Warren*, which was cited at the bar on behalf of the Respondent, established only this principle, that where a party applies to a court of equity, and carries on an unfounded litigation, protracted under circumstances, and for a length of time, which deprives his adversary of his legal rights, the court of equity considers that it should itself supply and administer within its own jurisdiction a substitute for that legal right, of which the party so prosecuting an unfounded claim has deprived his adversary. It was upon that principle that Lord *Eldon* made the order in *Pulteney v. Warren*, because there a party had by litigation improperly deprived his opponent of his legal remedy. It is for such reason that a court of equity will give a party interest beyond the penalty of a bond, where by unfounded litigation the obligor has prevented the obligee from prosecuting his claim at the time when his legal remedy was available, *Grant v. Grant* (i). Upon that principle it is that when a party by unfounded litigation has prevented an annuitant from receiving his annuity, the Court will in some cases give interest upon the annuity. All those cases depend upon the same principle of equity, a principle which cannot properly be applied to a case of a totally different nature, and one in which the circumstances do not seem to me to justify that which has been done in this case, namely, that an adverse

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(i) 3 Russ. 598.

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house there, a large quantity of goods and chattels and personal effects of various kinds, and of great value on the whole; that from the year 1824 down to the year 1832, both inclusive, several bills of sale and assignments of parts of the goods and chattels at *Blenheim* were executed by the Duke to the Appellant without any consideration, and no part of the said goods had ever been removed, but the Duke continued to use them as his absolute property, and that all the said bills of sale and assignments were void as against the Respondent; that in the year 1823, one *Charles Richardson* had a judgment against the Duke, and sued out execution thereon, under which property of various descriptions at *Blenheim* was seized by the sheriff of *Oxfordshire*, from whom *Richardson* took a bill of sale, and in *May* 1824 the Appellant took the said bill of sale from *Richardson*, and paid him 700*l.* for the goods and chattels comprised therein, and put his servant in possession of them at *Blenheim*. That in 1826 the Appellant sold the said goods to the Duke of *Marlborough* for 700*l.*, the whole of which had been since paid by the Duke, and he was the only person beneficially interested in and equitably entitled to the said goods and chattels, but the Appellant had not executed an assignment of them, and the legal property in them was still vested in him, and if he and the Duke would set forth an account of the pecuniary transactions between them from the year 1823, it would thereby appear that nothing was due to the Appellant in respect of the said 700*l.*; that the Respondent believed the Appellant was a trustee of the goods and chattels comprised in the bills of sale and assignments, and that the Duke had the beneficial and equitable interest in them, and they were the only property of the Duke that could be

below as regarded the refusing of the new trial to be had, it proceeded thus, "And it was further ordered, that the Respondent, *John Campion*, should have liberty to apply to the Court of Chancery for payment into Court of the said sum of 2,000 *l.*, or any part thereof, in case the said Appellants in such appeal should delay proceeding to such new trial." It is quite clear, that this could not mean to affect the *East India Company*, which was no party to the appeal then before this House. It appears to be clear, from the very words of the order, that the party against whom the application of it was intended to be directed—and was by the terms of the order directed—was not the *East India Company*, but *Bazett & Co.* The liberty was for application to be made in case the said Appellants in that appeal should delay proceeding to such new trial. Now who were the Appellants? *Bazett & Co.* And this plainly indicates, therefore, the purpose of the order to prevent any unnecessary delay in bringing that issue to a trial. It was apprehended that the Appellants, *Bazett & Co.*, having resisted the new trial, without first having the commission executed, might be slow in bringing it on, and that Mr. *Campion* might thereby be exposed to still further hardship in obtaining his rights, therefore it was said, he shall be at liberty to apply to the Court for a payment into Court. The purpose was to ensure expedition, if the Appellants should be found dilatory in bringing forward the trial, which the reversal of the order of the Court below had directed.

With respect to the costs of this appeal, Mr. *Campion* cannot, of course, have them from the *East India Company*. The *East India Company* have been put to an expense to which they ought not to have been

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what, if anything, he should pay the Appellant; or that the Master might take an account of the said goods and chattels, and ascertain the nature and amount of the equitable interest of the Duke of *Marlborough* therein, and that the same might be applied in satisfaction of the Respondent's debt, &c.

The Appellant, by his answer to the bill, admitted that the sheriff seized part of the goods and chattels at *Blenheim*, under the writ of execution issued in May 1833, and the Appellant claimed them as belonging to himself, and being in the possession of one *Wilson*, his servant, and he undertook to indemnify the sheriff for making the return of *nulla bona* to the writ. And the Appellant claimed to be the legal owner, as against the Respondent, of all the goods and chattels in and about the mansion-house and premises at *Blenheim* (except such as were heir-looms, and belonged to the trustees of the late Duke of *Marlborough*), by virtue of certain bills of sale, assignments, and other legal instruments duly executed for valuable consideration, and bearing date respectively as the answer mentioned. That the Duke was indebted to the Appellant as a judgment creditor and equitable mortgagee to the amount of 8,000*l.*, and that all the securities which had been obtained by him from the Duke, were a very scanty and insufficient security for the payment of the said debt. And the Appellant denied that any sum of money had been paid to him by the Duke, in satisfaction of the said 700 *l.* in the bill mentioned, or that the Appellant had received any sum or sums of money on account of the Duke, applicable to the payment of the said 700 *l.*; or that the Appellant agreed to sell to the Duke the goods and chattels comprised in the bill of sale, for which Appellant paid the said sum of 700 *l.*

IN A COMMITTEE FOR PRIVILEGES.

The WALDEGRAVE Peerage.

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July 14, 15.

The marriage of an officer celebrated by a chaplain of the British army within the lines of the army when serving abroad is valid, under the 9 Geo. 4, c. 91, though such army is not serving in a country in a state of actual hostility; and though no authority for the marriage was previously obtained from the officer's superior in command.

SIR W. FOLLETT, (with whom was Mr. *Maltby*,) in support of the claim of peerage:—This peerage is claimed by the eldest son of the last Earl. The claimant is the offspring of a marriage which took place in 1815 within the lines of the British army then serving in France. The marriage was valid. It was performed under circumstances which the law recognises as sufficient to constitute a valid marriage within the 9 Geo. 4, c. 91 (*a*). It was a marriage performed by a British chaplain within the lines of a British army serving abroad. It is not necessary, in order to give validity to such a marriage, that the army should be serving in a country at that moment in actual hostility to England. It is sufficient if the army is serving abroad under the orders of the Crown, and for the public service. The proof of the marriage under these circumstances will be

(*a*) By which it is recited, that it is expedient to remove doubts concerning the validity of marriages solemnized by a minister of the Church of England in the chapel or house of any British Ambassador or Minister, or in the chapel of any British factory, or "solemnized within the British lines by any chaplain or officer, or any person officiating under the orders of a commanding officer of a British army serving abroad." It then enacts that such marriages shall be as valid as if solemnized within the British dominions, with a due observance of all the forms of law.

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set forth an account of the pecuniary dealings between himself and the Duke since the year 1823.

Upon motion made before the Lord Chief Baron in July 1836, his Lordship ordered the Appellant to deposit with his clerk in court the several bills of sale, assignments, and legal instruments in his answers mentioned, and that the Respondent might be at liberty to inspect the same, and take copies, &c. (a).

The appeal was against that order.

Mr. *Simpkinson* and Mr. *Bethell* for the Appellant:—The production of documents to a plaintiff in aid of the discovery sought by his bill, before the hearing of the cause, is granted either on the ground that the defendant has made the documents part of his answer, or because the plaintiff can, out of the defendant's answer, show that he has an interest in the documents. That is a right to discovery of them, as forming part of his title-deeds, or as being material to the decision of the issue raised in the record. The Respondent has not shown such an interest in these bills of sale and other instruments, as could entitle him to such production and inspection of them as is directed by the order of the Court below: *Burton v. Neville* (b), *Sampson v. Swettenham* (c). It is of the greatest importance to the safety of suitors, that they be not compelled to produce their title-deeds. The courts do not require them to ask protection by plea against production of them, but will take care that they are not to be called on to produce them without good reason: *Hall v. Atkinson* (d), *Vansittart v. Barber* (e), *Lady Shaftsbury v. Arrowsmith* (f), *Bolton v. The*

(a) 2 Younge & C. 257.
 (b) 2 Cox, 242.
 (c) 5 Madd. 16.

(d) 2 Vern. 463.
 (e) 9 Price, 641.
 (f) 4 Ves. 66.

the Bois de Boulogne; that was two miles and a half distant from the quarters of the Duke of Wellington.

Re-examined:—The duties of the officers were performed where the regiment was stationed; there was a continuation of the British camp to a place beyond Lord Waldegrave's quarters; had frequently met Sir C. Colville in Lord Waldegrave's house, both before and after the marriage.

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The Duke of *Wellington*:—I was in command of the army of occupation at Paris in 1815; Lord Waldegrave's regiment formed part of that army; I know the quarters of the 54th regiment; the house occupied by Lord Waldegrave was within the British lines; the lines extended over the whole of Paris; the troops did duty in all parts of Paris. There was a commandant appointed by the commander-in-chief, but the police was on service; my quarters were in the Champs Elysees, and Lord Waldegrave's quarters were about 50 yards from the camp there, and 150 yards from my house. The commanders of regiments were permitted to take lodgings in the town, provided they attended their duties in the camp.

Cross-examined:—The date of the suspension of hostilities was about the 3d of July. Louis XVIII. returned to Paris about the 6th or 8th of that month; the ministers were appointed a few days afterwards; they had been with him at Ghent. Sir Charles Stewart, the British ambassador, had been with the King there, and returned to Paris a few days after the arrival of the King. Lord Castlereagh was there; and I was also accredited to the congress of sovereigns held at Paris. The national guard was reorganised, and was entrusted with a part of Paris. I do not remember whether there was any stipulation that it should be so.

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allowed to remain in the use and ostensible possession of the Duke of *Marlborough*. But it was held in this very case, and in others of later occurrence, that a bill of sale is not fraudulent by reason of the goods remaining in the possession of the vendor or debtor: *Latimer v. Batson* (s), *Martindale v. Booth* (t).

The *Lord Chancellor* :—The Respondent's bill treats the Appellant as equitable mortgagee, as an incumbrancer for 700 l., and states, in effect, that the Duke of *Marlborough* is owner of the property, subject to that debt.

Mr. *Temple* and Mr. *Ellison* for the Respondent :—The Appellant's claim on the goods in the use and possession of the Duke of *Marlborough*, is liable to much suspicion. If he has an honest claim and lien on the goods comprised in the bills of sale, what injury can he sustain by producing them? The Respondent will be unquestionably entitled to a full disclosure, if he will only amend his bill and submit to the delay and expense of beginning again. The parties to the action are at issue; the venue is laid in *Oxfordshire*, but they have been waiting the result of this appeal. The Appellant can, at most, be only trustee for the Duke of *Marlborough*, who has the beneficial interest in the goods and chattels, and by the operation of equity, the Respondent's judgment attaches on that interest.

The rule that a purchaser for valuable consideration cannot be compelled to produce his title-deeds does not extend to bills of sale and assignments, of which the Respondent demands inspection. They are

(s) 4 Barn. & C. 652.

(t) 3 Barn. & Adol. 498.

and that the claimant was born in Grosvenor-place, London, February 6, 1816.

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Dr. *Lushington* (with whom was Mr. *Austin*), on the part of Capt. *Waldegrave*, the brother of the late Earl:—After this evidence, it cannot be denied that the form of a ceremony of marriage was gone through within the British lines upon the 3d of October 1815, but this ceremony did not constitute a valid marriage. In the first place, it was not a marriage according to the laws of France. It was not a marriage valid at common law; nor did it constitute a valid marriage within the protecting provisions of the statute 4 George 4, c. 91. The object of that statute is to impose regulations on acts done by persons not within the realm of England, and which acts are to give a *status* to the persons, whatever may be the *lex loci* of the marriage. If that act does not apply, the *lex loci* must prevail; and then it must be conceded that this was not a valid marriage. Why is it that certain marriages not celebrated according to the *lex loci* are treated as valid? First in respect of the comity of nations, and next on account of the necessity of the case.

As to the first. The comity of nations permits the chapels of ambassadors, or, in some particular cases, of British factories, to be for such a purpose excepted from the laws of the country to which the embassy is sent, or where the factories exist, these exceptions being duly recognized by our own laws. But to make a marriage good at the chapel of the British embassy, or of a British factory, it must be celebrated in such a manner as would make it valid at that moment in England. That was clearly not the case in the present instance. Then does the se-

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of inspection." So again in *Balch v. Symes* (b), his Lordship said, "Where a deed is sought to be impeached, the plaintiff is entitled to have it produced," &c. To the same effect is the decision in *Kennedy v. Green* (c), and the whole doctrine of the courts of equity in respect to the production of documents is laid down by Sir *Lancelot Shadwell*, one of the Lords Commissioners of the Great Seal, in 1835, in the case of *Hardman v. Ellames* (d).

The *Lord Chancellor* :—My Lords, if I conceived that this case involved the consideration of some of the arguments which have been addressed to your Lordships, and of the cases that were cited, I should think it a case of considerable importance; but in my view of the proceedings which have taken place in the Court below, and before your Lordships, it does not appear to me that it is at all necessary to enter into the consideration of some of those most important questions which have been discussed. It has been properly admitted by the counsel for the Appellant, that if it appeared from the whole of the pleadings that the title claimed by the Appellant is, in fact, only a mortgage title, and that the Respondent has so framed his record as to entitle him to deal with that mortgage title and redeem it, the Appellant would not at your Lordships' bar argue that, under the circumstances, he could resist the right of the Respondent to have production of the documents. It is true, the bill is not framed exactly in that form in which one usually sees bills framed which seek to make an absolute conveyance available for the purpose of securing a mortgage debt. Still, however, the equity

(b) Turn. & R. 92.

(c) 6 Sim. 6.

(d) 2 Myl. & K. 755.

such a marriage as the Act contemplated, and, having been celebrated without due authority, it is void.

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Sir *W. Follett* in reply:—There is nothing in the Act which requires that the authority of the commanding officer should be given previous to the marriage. A marriage contracted without the commanding officer's authority may subject the party contracting it to punishment as for a breach of military discipline, but will nevertheless be a valid marriage.

The *Attorney-General*, who was watching the case on the part of the Crown, said that he had reported to the Crown that the claimant was entitled, but recommended that the decision of their Lordships should be taken.

The *Lord Chancellor*:—When I refused to issue the writ to the claimant, it was because I wished the facts, of which, however, I had no doubt, to be proved at the bar, and the judgment of your Lordships to be taken upon them. On the question whether the marriage was celebrated within the lines of a British army serving abroad, I have no doubt; nor do I think it necessary that that army should be serving in a country in a state of actual hostility. But on the question whether such a marriage as the present, in order to be valid, requires the previous sanction and authority of the commanding officer, requires consideration, and I shall therefore move that the decision be postponed.

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property, the decree of the Court would be to do away with those assignments, so far as they were transfers of the property, but to let the Appellant have the benefit of them for the purpose of securing the debt due to him from the Duke of *Marlborough*. If the record, therefore, is so framed that the Respondent, being a judgment-creditor, had a right to redeem the Appellant, and to put himself in the place of the mortgagor, the Duke of *Marlborough*, it is not very material whether the bill is framed precisely in those words, and containing those statements, and that prayer, which might be the most usual and technical mode of stating such a case.

The Appellant, in his first answer, says, that he holds adversely against the Respondent, and says he claims to be the legal owner under and by virtue of several bills of sale, and he gives the dates; all which said bills of sale, assignments, and legal instruments, he says, were duly executed to him for a full and valuable consideration. It is impossible to read that passage in the answer, without seeing that the Appellant meant to represent that he was the actual purchaser; he states the deeds to be actual assignments of the property to him, and that they were assignments for a full and valuable consideration. But then, in a subsequent part of the answer, he states, "that the said Duke was then indebted to the Appellant as a judgment-creditor and equitable mortgagee to the amount of upwards of 8,000 *l.*, and that all the securities which had been obtained by the Appellant from the Duke, and all of which were then in the Appellant's possession or power, were a very scanty and insufficient security for the payment of the said debt." And then he says, "That as between the Appellant and the said defendant, the Duke of

APPEAL

FROM THE COURT OF CHANCERY.

1837.

May 8, 9. 23.
June 12.

ANN MORTIMER, Widow and Executrix }
 of GEORGE MORTIMER - - - - } *Appellant.*

PETER TREZEVANT, and Others - - *Respondents.*

J. F., a man of great wealth, about seventy years of age, and *Gift or Loan.* having no child of his own, gave an order on his bankers, in *October* 1821, to advance to *G. M.*, his favourite nephew, "such sums of money as they might think prudent, with the opinion of *D. C.*, for the purpose of assisting him to pay in ready money for his goods." In pursuance of this order, *G. M.* drew cheques for 6,000 *l.* and 4,000 *l.*, and they were duly honoured. In *August* 1824, *J. F.* gave the following order on his bankers: "Please to honour such cheques as Mr. *G. M.* may draw for my use, &c." In pursuance of this order also, *G. M.* drew cheques, and they were honoured. In *April* 1826, *J. F.* caused a sum of 20,000 *l.* to be advanced to *G. M.*; who also had from one of *J. F.*'s tenants, wool and sheep, the price of which was, by agreement to which *J. F.* was a party, set off against the rent due to him from the tenant. *G. M.* further received from the partners of *J. F.*, by his direction, a quantity of indigo, and took possession of furniture and other property of *J. F.* before his death. In a suit for the administration of the estate of *J. F.*, who died intestate, a state of facts was carried in before the Master under the usual decree for an account, charging *G. M.* as debtor to the estate for the 6,000 *l.*, 4,000 *l.*, 20,000 *l.*, and the prices of the wool, sheep, indigo, and furniture; in answer to which he insisted that all these advances in money and goods were absolute gifts to him and his family from *J. F.*, and that an admission made by him, after *J. F.*'s death, that the sum of 20,000 *l.* was a loan, had been obtained from him fraudulently by the administrator, and he pro-

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unto annexed, he prayed might be taken as part of his said answer, has set forth to the best and utmost of his knowledge, &c., an account or description of all and every the said bills of sale and assignments of the said goods, chattels, and personal estate." And he goes on with the enumeration of the particulars which he states he had set out in his answer.

In the first answer, in stating the assignments under which he claims, he sets forth, amongst others, one of *June* 1829, one of *June* 1832, of *May* 1833, and one of *June* 1833. Being called on, by the exceptions that were allowed, to state more particularly what were the nature, contents, and particulars of these assignments, he, in the second answer, swears he has done so, when it appears that there is no deed stated beyond the date of the 1st of *June* 1829. Why he has omitted those three subsequent deeds, he does not explain; but it appears, in his second answer, that he has sworn that he has set out all the deeds under which he claims as against the Respondent; and therefore, it must be assumed he has no other deeds but those he has so stated in the schedule. Now, if the Appellant was entitled to that protection against discovery which he now seeks to enforce at the bar, the order of the Court of *Exchequer* was clearly wrong in allowing these exceptions, because a defendant may be bound to state in his answer and describe the documents; he may be compelled to admit he has such documents in his possession, but not compellable to state the contents, if he is entitled to protect himself by any rule which prevents a plaintiff asking for the production of the documents. If he professes to set out the document, the plaintiff has a right to see

In the latter end of the month of *December* 1826 Mr. *Peter Trezevant* and *Elizabeth Willoughby*, his wife, arrived from *America* in this country. On the 10th of *July* 1829 they, together with the trustees of their marriage settlement, filed their bill in Chancery against the said *J. F. Fraser, J.* and *G. Mortimer, Sir W. T. Pole* and his wife, *J. Lumsden* and his wife, and *W. Aithen* and his wife, thereby stating, amongst other things, that Mr. *Farquhar* was, at the time of his decease, seised to him and his heirs of very considerable freehold and copyhold estates, which he had contracted to sell, and that he was possessed of very considerable personal estate, and that he died intestate, leaving the plaintiff, *Elizabeth Willoughby Trezevant*, his heir at law and customary heir, and also leaving her, together with the other six above named relations, his only next of kin him surviving; and also stating a settlement, whereby trustees were appointed for the plaintiffs of one-seventh share of the personal estate and effects of the said Mr. *Farquhar*, and of the monies to arise from the sale of his freehold and copyhold estates; and also stating that Mr. *J. F. Fraser*, by virtue of the letters of administration granted to him, had possessed himself of the personal estate of the said intestate. The bill prayed that an account might be taken of the personal estate and effects of the said intestate come to the hands of Mr. *Fraser*, and that an account might also be taken of the debts and funeral expenses of the intestate; and that his personal estate might be applied in a due course of administration, and that the clear residue thereof might be ascertained, and that one-seventh part of such residue might be paid by Mr. *Fraser* to the trustees of the said settlement upon the trusts thereof.

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of the premises, and for better securing payment of the said sum of 1,800 *l.* and interest, so due and owing from the said Duke to the said *Edward Latimer* as aforesaid, and also in consideration of 10 *s.* to the said Duke paid by the said *Edward Latimer* at the time of executing these presents, he, the said Duke, had bargained, sold, assigned, transferred, and set over unto the said *Edward Latimer*, his executors administrators and assigns, all the several cattle, wines, books, musical instruments, plants, goods, chattels and effects, in the inventory thereunder written particularly mentioned, being in and about the mansion-house, garden, stables, grounds, and park of *Blenheim*, of which the said Duke had delivered to the said *Edward Latimer* full and actual possession: proviso, that the now abstracting indenture was only intended for further and better securing the payment of the said sums of 1,800 *l.* and interest, and that if the said Duke, his executors, or administrators, should pay, or cause to be paid, the same to the said *Edward Latimer*, his executors, administrators, or assigns, on the 8th day of May then next ensuing, that indenture should cease and determine."

There is, therefore, no question but that the title of the Appellant on his deed is only a mortgage title, and it is equally free from doubt, according to my view of the pleadings, that the Respondent is entitled to redeem that mortgage upon the payment of what may be found due, not being precluded from that right by the mode in which he states the case, the object of the deeds being not to give an absolute title to this property against the Duke, or those who claim under the Duke, but for the purpose of securing a sum of money due from the Duke to the Appellant.

directions in such cases; and the decree also directed the Master to take an account of the personal estate and effects of the intestate then outstanding, and to inquire whether it would be for the interest of the parties beneficially interested that any proceedings should be commenced for the purpose of getting in the property outstanding, and whether any of the contracts of the intestate for sale of his real estates were then subsisting, and capable of being or ought to be carried into effect, &c.; and also to inquire who were the next of kin of the intestate living at his death, &c.

In *December* 1830, Mr. and Mrs. *Trezevant* and their trustees carried in before the Master a state of facts and charge to the following effect: That the defendant, *G. Mortimer*, carried on the business of a wool-broker and merchant in London, and having represented to the intestate that he should derive greater benefit from his business if he was enabled to pay ready money for his purchases, prevailed on the intestate to give him an authority, addressed to intestate's bankers, for the advance of sums of money for the purpose aforesaid, as follows: "To Messrs. *Barnetts, Hoare & Co. London*, 2nd of *October* 1821: Gentlemen, I request you will please to advance Mr. *George Mortimer* such sums of money as you may think prudent, with the opinion of Mr. *David Colvin*, for the purpose of assisting him to pay in ready money the wool with which he manufactures his cloth. I am, gentlemen, your most obedient servant, *John Farquhar*." That at the same time defendant undertook to pay the intestate 5 *l. per cent per annum* upon each of such advances; that in pursuance of the said authority the defendant drew various drafts on the said bankers, and amongst the rest he drew one on the 15th *October* 1821 for 6,000 *l.*,

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to have enabled the parties to go on with the action at the last assizes. I have no doubt that the application would have been granted, if made.

The order of the Court below was affirmed, with costs.

END OF PART III. VOL. IV.

and although it was expressed in the said agreement that the intestate, in consideration of 1,700*l.* paid to him by the defendant on the 5th of *December* then last past in part payment of the said purchase-money, yet the plaintiffs charged that in fact the sum of 1,700*l.* was never paid by the defendant to the intestate, and the plaintiffs therefore charged, that the whole of the said 19,700*l.* was still remaining due from the defendant, together with interest thereon at the rate of 5*l. per cent. per annum*, from the 11th day of *October* 1826, except the sum of 675*l.* paid to the administrator by the said defendant on account of interest; that the intestate, on the 22d of *April* 1826, through *Bazett, Colvin & Co.*, with whom he was a partner, lent the defendant 20,000*l.*, and the same with interest was then due from the defendant; that *Mr. John Benett*, of *Pythouse, Wiltshire*, being indebted to the intestate in 7,000*l.* for rent of parts of the estate purchased by the intestate of *Mr. Beckford*, the defendant prevailed upon the intestate to allow *Mr. Benett* to supply him with wool for the purposes of his factory to the amount of his rent, to which the intestate and *Mr. Benett* consented, and *Mr. Benett* accordingly supplied the defendant with wool to a large amount, and the defendant undertook to account to the intestate for the same, and to pay him the value thereof with interest; that the intestate and his partners being, in the year 1825, possessed of a large quantity of indigo, the defendant induced the intestate to prevail on his said partners to consent to the same being delivered to the defendant to be used in his said factory, the defendant undertaking to pay the intestate the value thereof, with interest; and the said defendant accordingly received a large quantity of the said indigo from the intestate and his part-

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the sums of money, therein stated to have been advanced by the intestate to him, were advanced as loans at interest; on the contrary, he stated, that the same were absolute gifts to him, and were always so considered by the intestate, as well as all the other property and effects, consisting of the wool and sheep, the indigo and the household furniture and effects; and he further stated, that the intestate had always treated him in every respect as a parent, and as such always expressed himself most anxious to further his prospects in life, and to provide for him and his family; and he by the said answer admitted that the sum of 18,000 *l.*, the remainder of the purchase-money for part of the *Fonthill* estates purchased by him, together with interest thereon, and the sum of 37 *l.* rent, received by him on account of the intestate, and the sum of 45 *l.*, for a small quantity of furniture taken by him at a valuation, were then still due and owing from him to the estate of the intestate.

As evidence to show that the sums of 20,000 *l.* and the sums of 6,000 *l.* and 4,000 *l.*, received by Mr. *Mortimer* from the intestate at different times, were absolute gifts and not loans, he exhibited in his examination the following letter:—“*Church House, 30 April 1826: DEAR GEORGE,--To relieve your anxiety about matters concerning money, I tell you that all sums of money you have ever received from me are gifts and not loans; this I think ought to satisfy your lady, and convince her that I am doing a great deal for the benefit of your family, as I have always told her. I remain yours truly, J. Farquhar.*”—This letter was stated to have been written in consequence of some anxiety which Mr. *Mortimer* told the intestate was felt by himself and his wife, to have some memorandum in writing from him, that the sums

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represent, to compel specific performance of a contract for the purchase of the reversion of an estate then held upon lives. A decree was pronounced in the suit on the 24th February 1821, and certain matters therein stated were referred to the Master, who was directed to report how much the value of the estate had been increased by the dropping of lives. Other proceedings took place, and on the 9th of July 1831, a decree was made which was subsequently brought up by appeal to this House (*a*), and, after argument, was reversed. At that time the decree of 1821 had not been enrolled. That decree was afterwards enrolled in or as of Hilary Term 1836, and the present appeal was then brought upon it. The competency of the appeal brought against a decree made so many years before, became the subject of discussion, and this House decided (*b*), that the time for presenting petitions of appeal begins to run from the enrolment of a decree of a Court of Equity and not from the period when that decree was pronounced. The appeal therefore, being held competent in point of time, now came on for hearing. The grounds of the appeal were, that the decree of February 1821 ought to have directed an inquiry as to how much the value of the estate had been increased by the wearing of the lives or increase of the ages of the persons for whose lives any parts of the estate were held at the time of the contract, or otherwise that the directions contained in the decree as to the dropping of lives from the 29th of September 1811 should be omitted. The clause of the contract on which the question chiefly depended was in the following terms :—" And Champernowne did

(*a*) *Ante*, vol. 3, p. 4, where all the circumstances of the case are fully stated.

(*b*) *Ante*, p. 247.

fixtures then remaining ; and also any timber on the estate that he might think necessary to complete and furnish the new house built by him as a free and absolute gift, and as his authority for so doing, the intestate delivered to him the following letter :—" *Mr. George Mortimer*: DEAR SIR,—The plate, furniture and fixtures, or any of the materials or glass you may require from the Abbey to complete your new house, or any description of timber on the *Fonthill* estate, you are to take away before the property is valued. *J. Farquhar*." Under the authority of this letter, the examinant did take possession of a small part of the said furniture, plate, &c., as a free gift from the intestate.

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The plaintiffs carried in before the Master an amended state of facts in *August* 1831, and they thereby charged that the above stated three letters exhibited by *Mr. G. Mortimer* in his answer to their interrogatories, were false and fabricated documents ; and they insisted that the price of the wool and sheep bought of *Mr. Benett*, amounting together to 6,204 *l.* 8 *s.* 11 *d.*, and the price of the indigo at 2,375 *l.* 13 *s.* 5 *d.*, and the 20,000 *l.* and the other sums advanced to *Mr. G. Mortimer*, were due from him to the estate of the intestate, with interest at the rate of 5 *l.* per cent. from his death (1826). And as evidence that the sum of 20,000 *l.* was so due, they produced the following written acknowledgment :—" *London*, 4th *December* 1826: In *April* 1826, *Mr. G. Mortimer* received of the late *John Farquhar*, esq., 20,000 *l.*, which he considered as a gift ; on the contrary, the other next of kin of *Mr. Farquhar* allege the said sum was advanced only as a loan. To prevent any disputes hereafter upon that question, *Mr. Mortimer* consents to treat the same as a loan, pro-

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In this second agreement, the Appellant contends that there is an express stipulation for the performance of the contract on the 1st of May 1813. In the former contract, it was contemplated that the purchase might be completed before or after the time therein stipulated. This makes an essential difference between the two contracts, for payment on a day certain is here expressly provided for. Then follows the clause on which the question before the House mainly depends, namely, that which provides for the way in which the increased value shall be known (c). Every life which has dropped since 1811 should be calculated; the whole of what constitutes the value of the estate goes to the purchaser after that. The Respondent Champernowne, in his answer, stated that his refusal to complete the purchase did not arise from any objection to the estate itself, but that he conceived, that under the circumstances of the case, he was not bound to complete the purchase. If he had relied in his answer on the want of a title, the only proper decree would have been, to refer it to the Master to ascertain whether there was a good title. But as the delay here arose from other causes, the decree necessarily goes farther, and directs an inquiry into the increased value of the estate from the dropping of lives. Now to all substantial purposes, the title was completed and satisfactorily made out before that period. The Master, however, did not find that the vendors were able to make a title before the institution of the suit, but exceptions were taken to that finding, and were allowed by the Court, so that it now stands, that before 1817 there was a good title made to the estate, for in March 1817, the counsel for Mr. Champernowne had declared the title to be in a marketable state. The delay so far, therefore, was entirely the delay of the Respondent. He cannot be allowed to

(c) See *ante*, 560, 561.

G. Mortimer for parts of the real estate of the intestate, together with interest thereon, from the 11th of *October* 1826, and also the two several sums of 45 *l.* and 37 *l.*, and that it did not appear to him that it was necessary to take any proceedings other than the proceedings in that suit, for the purpose of getting in the said sums.

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To this report exceptions were taken by the plaintiffs, Mr. and Mrs. *Trezevant*, and their trustees, and also by Mr. *Fraser*, on the ground that the Master should also have found to be due from *G. Mortimer's* estate to the estate of the intestate, the following sums, viz. 10,000 *l.*, composed of the two sums of 6,000 *l.* and 4,000 *l.* received by *G. Mortimer* in *October* 1821, upon his cheques drawn on *Barnetts, Hoare & Co.*, under the before-mentioned authority of the intestate; 2,375 *l.* 13 *s.* 5 *d.*, the price of the indigo before-mentioned; 6,254 *l.* 6 *s.* 11 *d.*, the price of the wool and sheep purchased by *G. Mortimer* of Mr. *J. Benett* in 1825, and paid for by a set-off of rent due from *Benett* to the intestate; 266 *l.* 1 *s.* 4 *d.*, the amount of a cheque drawn by *Benett* on one *Knight*, and 664 *l.* 11 *s.* 9 *d.* paid by *Benett* in respect of more rent, both sums amounting to 930 *l.* 13 *s.* 1 *d.* received by *G. Mortimer* as the agent of the intestate; the value of timber cut at *Fonthill* and of furniture left at the abbey, and the statue of Alderman *Beckford* before-mentioned, kept in the possession of *G. Mortimer*. The first, second, third, fourth, and fifth exceptions by the plaintiffs, applied respectively to the said sums of 10,000 *l.*, 6,254 *l.* 6 *s.* 11 *d.*, 266 *l.* 1 *s.* 4 *d.*, 664 *l.* 11 *s.* 9 *d.*, and 2,375 *l.* 13 *s.* 5 *d.* By the sixth and seventh of their exceptions, they insisted that the outstanding personal estate of the intestate consisted of the further sum of 1,000 *l.*, the value of the furni-

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House of the order of 1831, has necessitated the present appeal. The general doctrine of the Courts, on the question of the receipt of rents and profits, and of interest, is laid down in two cases of *Powell v. Martyn* (d), and *Fludyer v. Cocker* (e). The former of these cases is to this effect: "To excuse a purchaser from paying interest during the delay in clearing up difficulties as to the title, it is not sufficient that the money was appropriated and unproductive, but the vendor must have notice of that." Sir W. Grant, who decided that case, said, "The rule is perfectly clear and perfectly reasonable, that if a purchaser is let into possession and perception of the rents and profits, he shall pay interest for his purchase-money. On the other hand, it must be admitted that a case may be in which he shall not pay interest, notwithstanding he has the rents and profits. But it must be a strong case, and clearly made out." In *Fludyer v. Cocker* (f), a purchaser taking possession without a conveyance was compelled to pay interest, though the money was to be paid at a particular day on the execution of the conveyance; and the Master of the Rolls then said, "The only question is, how the contract was to be carried into execution. The act of taking possession is an implied agreement to pay interest, for so absurd an agreement, as that the purchaser is to receive the rents and profits, to which he has no legal title, and the vendor is not to have interest, as he has no legal title to the money, can never be implied. It would sound very strange if the purchaser had paid the money as being bound to pay it, and the vendor, having had the use of it for four or five years, should then refuse to account for the rents and profits. There is not a

(d) 8 Ves. 145.

(e) 12 Ves. 25.

(f) 12 Ves. 25.

from the intestate, and this claim of gifts rests, first, on the authority of the order addressed by Mr. *Farquhar* to Messrs. *Barnetts, Hoare & Co.* in October 1821. The first question is, whether evidence of gift is to be found in that document, which is in these words—(his Honor read it, as in p. 661, *supra*). Now the contents of that document entirely negative the idea of gift at that time; whether the advance of money thereby directed was afterwards converted into gift is another question, hereafter to be considered; but as to the question arising out of this document, whether this was originally a gift or loan, it is to be observed, there is no limit in amount to the license of advancing. As a gift, it would amount to the whole fortune of the giver, but he refers it entirely (supposing it to be a gift) to the discretion of Mr. *Colvin*, to what extent the gift should go. If the intestate meant loan, it is very natural to suppose that he should wish to restrain the advances to what the situation and circumstances of the party borrowing might render expedient, and therefore he referred it to an individual in whose discretion he could trust as to how far it would be safe to make the advances. It is impossible to hold that this document is evidence of gift and not of loan. But it is said that, at a subsequent period, other documents from the intestate confirmed *G. Mortimer's* representation that this was gift. A question having arisen between *G.* and *James Mortimer*, brothers and partners in business, an arbitrator was appointed to settle the accounts between them; and in order to ascertain whether the sums received by *George* under this authority were to be carried to his account individually, or to the common account, the intestate wrote a letter in these terms: “The money advanced by me to Mr. *George*

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case of *Blount v. Blount* (i), where it was declared that "The advantage a purchaser receives from the wearing out of lives has never been considered as a reason by this Court for his paying interest for the purchase-money. The Court, in awarding interest, never regards the execution of articles for a purchase, but the time of the execution of the conveyances, and even then the purchaser shall pay interest only from the time when the possession is delivered. Where, after a person is reported the purchaser, lives have dropped in, the Court has directed the purchaser to make some compensation in respect of the estate being bettered." It is clear that the judgment there must have rested on the peculiar circumstances of the case itself, or else it is not reconcileable with that of *Davy v. Barber*, in which the general principle is strongly and clearly stated, and which has never been overruled. In *Blount v. Blount* too, there must be some mistake, for a purchaser cannot be charged with the falling in of lives or with fines for letting out the estates again, and yet it is so stated there in the judgment, though it appears from the registrar's book that there was no direction whatever in the order as to the fines. It is clear too that *Blount v. Blount* has not since been acted on, for in *Trefusis v. Lord Clinton* (k), a purchaser of a reversion was ordered to pay interest on his purchase-money from the time of the purchase. *Blount v. Blount* was mentioned there, but overruled. The authorities and the practice therefore alike warrant the objections to this decree, which must be reversed.

Sir William Follett and Mr. Wakefield (Mr. Coleridge was with them), for the Respondents:—The

(i) 3 Atk. 636.

(k) 2 Sim. 359.

be a loan ; for, if it was gift, he could not withdraw it. Mr. *Barnett*, of the house of *Barnetts, Hoare & Co.*, deposed that Mr. *Farquhar* gave *G. Mortimer* an unlimited power to draw on their house. The power was in these words : “ Please to pay such cheques as Mr. *G. Mortimer* may draw for my use.” It is not an uncommon thing for persons to trust others to draw money for their use, but such an authority does not operate as a gift to the person to whom it is given, and certainly it is no evidence that a sum drawn under another authority is a gift. Then next come the depositions of Mrs. *Mitchel*, that Mr. *Farquhar* said he had given large sums of money to *G. Mortimer*, but she does not mention the sums or time they were given, nor any other particular that could connect that conversation with the sums now in question. But Mr. *G. Mortimer* produced, in his examination, three documents, which are of an extraordinary description. One of them is dated *April* 1826, and is applicable to these sums. [His Honor read it, as in p. 665, *supra*.] It was admitted that the body of this document was not in the handwriting of Mr. *Farquhar*, and the contest on the evidence was, whether it received his signature ; but, assuming that it did, still the terms are not sufficiently distinct exactly to know whether the document is to be taken as evidence of the advance having been originally a gift, or originally a loan and afterwards made a gift by this instrument. A conclusive objection to this instrument is, that no account is given when, or by whom, or under what circumstances, it was written. It was in the possession of *G. Mortimer*, and it was not put forward till long after the question arose as to the sum of 20,000*l.*,

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causes than that of a defective title. That is not so, for from the first the purchaser has insisted on the want of a good title. This appeal is in fact to obtain an increased value for the wearing of lives, as well as for the dropping of them, during a delay in completing the purchase occasioned by the act of the vendor. That cannot be allowed. In the first place it is not demanded in the bill, and it is admitted on the other side that the decree is according to the form of the prayer of the bill. It is now prayed that the decree may be altered for the purpose of embracing an account of what is not claimed in the bill. That cannot now be done: *Chambers v. Lord Dunsany* (l). Lord Eldon there says (m), "I own I originally thought that the account of the personal fortune was necessary if called for. It was positively insisted on by the appellant at the bar of this House. But your Lordships may judge my surprise when, after reading every word of the record, I find that no such account was looked for by any one of the parties. As the point was not made below, it cannot be made by way of appeal." It is said that the party who is to receive the benefit of the dropping of lives is for that reason to receive the benefit of the wearing of lives. But if that is necessarily to be implied from the contract, then the decree cannot be required to charge it on the party, and an exception might have been taken to the report for that reason. There is no question here as to the general rule regarding interest, but if there was, that question must be decided in favour of the Respondent, for the general rule on that subject is, that the liability to pay interest is to be fixed on that person whose conduct has occasioned the delay. In *Esdaile v. Stephenson* (n), Sir J. Leach thus stated

(l) 2 Sch. & Lef. 690. (m) P. 712. (n) 1 Sim. & Stu. 122.

the rule : "Where there is no stipulation as to interest, the general rule of the Court is that the purchaser, when he completes his contract after the time mentioned in the particular of sale, shall be considered as in possession from that time, and shall from thence pay interest at 4 *l.* per cent., taking the rents and profits. If, however, such interest is much more in amount than the rents and profits, and it is clearly made out that the delay in completing the contract was occasioned by the vendor, then to give effect to the general rule would be to enable the vendor to profit by his own wrong, and the Court therefore gives the vendor no interest, but leaves him in possession of the interim rents." His Honor followed that rule in *Monk v. Huskisson* (o), and Lord Lyndhurst adopted it, and acted on it in *Jones v. Mudd* (p). As to the wearing of lives, is it not a fallacy to consider that as part of the profits of the estate? It is to put the purchaser in a new position; it is to insist that, instead of paying what has been agreed on as the purchase-money, he shall pay an additional amount. Suppose the increased value of the estate, from the wearing of lives, would amount to a larger sum than the interest on the purchase-money, would the Court, when a defendant had agreed to pay 70,000 *l.* for an estate, compel him to pay 140,000 *l.* on that account? The wearing of lives does not form part of the rents and profits of the estate. The purchaser has a right to say that he did not intend to buy such an estate, that that matter was not inserted in the contract, and that if the vendor intended to claim the benefit of it, he ought to have inserted it in the contract. In a case of this sort the question of who seeks to enforce the contract makes

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(o) 4 Russ. 121. n.

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a material difference in point of principle. If the vendee seeks to enforce the contract, the Court may perhaps grant his prayer on condition, but if the vendor seeks to enforce it, the vendee certainly has a right to refuse such an added condition, and to declare that he did not purchase such an estate. It is sufficient for this argument to maintain that the vendee is not bound to pay interest till the title is completed. That, however, is not the question here; the question really is, whether this House will, on appeal, alter a decree made in conformity with the agreement of the parties, and with the prayer inserted in the bill of the very party who now seeks the alteration. Then, as to the dropping of lives, it is contended that that is to be calculated to the 1st of May 1813; that is not so, the dropping of lives must be calculated up to the time of the actual completion of the purchase. *Powell v. Martyr* (q) and *Fludyer v. Cocker* (r) only show that it is the general rule that a purchaser let into possession shall pay interest on unpaid purchase-money, but they distinctly admit that there may be cases where that rule will not apply, and in each case the judgment of the Court proceeds on the ground that the purchaser has obtained an advantage by being let into possession. That is not the case here, and the distinction is important. *Jones v. Mudd* (s) is more in point with the present case. There a purchaser who had not been in possession was held bound to pay interest, and take the rents and profits only from the time when a good title was first shown, and not from the time fixed by the agreement for the completion of the purchase. It is impossible to understand from the short note of *Trefusis v. Lord Clinton* (t) from what

(q) 8 Ves. 145.
 (r) 12 Ves. 25.

(s) 4 Russ. 118.
 (t) 2 Sim. 359.

time interest was allowed there. Then as to the giving of interest on the wearing of lives, there are the cases of *Davy v. Barber* (u) and *Blount v. Blount* (x). In the first of these the dropping of lives was considered as an annual profit, and therefore subject to be made the ground of payment of interest by the purchaser. That case does not show that the wearing of lives is to be considered in the like manner, and the same Lord Chancellor afterwards decided the second of these cases, and expressly declared that he never knew the Court take the advantage a purchaser received from the wearing of lives into consideration as a reason for the purchaser's paying interest. But even in *Davy v. Barber* the purchaser had been actually let into possession. It has been said (y), that at the time *Blount v. Blount* was decided the Court did not calculate as well then as now the increased value of estates. That cause of increased value might not be as well understood at that moment as at present, but its existence was known and was taken into consideration, and after discussion on the subject the Lord Chancellor rejected it as a ground for giving interest.—[Lord Brougham: You object, as a purchaser, to being compelled to take a different thing from what you bought, but that applies equally to the dropping as to the wearing of lives.]—That objection is not properly applicable to the argument now referred to, for in this contract there is an express arrangement respecting the dropping of lives, but there is none as to the wearing of lives, which is now sought to be introduced by implication into the case. To impose this other term on the purchaser will be to make a new contract. The contract here does not

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(u) 2 Atk. 489.
 (x) 3 lb. 635.

(y) Per Lord Brougham, *ante*,
 vol. 3, p. 23.

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rest upon a general principle, but is the subject of a specific agreement. From that agreement the parties are not at liberty to depart. The claim now made was not made in the Court below, and therefore cannot be entertained upon appeal.—[Lord *Brougham*: That rule is not without an exception.]—Perhaps not, but the party seeking to introduce a new point here must fully account to the House why it was not made in the Court below. There is no equity in favour of a purchaser who might have made good his title long ago, but avoided doing it. This new ground of value cannot be introduced for another reason. Its introduction would be to defeat the provisions of the 43d Geo. 3, c. 49, s. 122, which declares that the consideration money directly or indirectly paid shall be truly stated in the contract. The wearing of lives was not stated as part of the consideration. The delay here was on the part of the vendor, who now seeks to enforce the contract, and to reap a benefit from his own delay. The vendee does not now want the contract to be performed, for this delay has seriously injured him. Under such circumstances the vendor has no equity to enforce the contract, and to introduce into it a new term for his own advantage. The decree here is in conformity with the agreement between the parties, with the calculation of the dropping of lives, with the allegation of the Appellant's own bill, and with the prayer of that bill. The decree therefore must be affirmed, and the Appellant cannot ask this House to insert in it that which will make the contract in effect a new contract, and will in substance reverse the decree which has given him all that he originally sought to obtain.

to the other points. Mr. *Mortimer* claimed the price of the indigo as a gift to him from Mr. *Farquhar*, and he relied on the letter dated the 29th of *October*, written by Mr. *Farquhar* to Mr. *Bazett*, one of his partners, in which, speaking of Mr. *Mortimer*, the writer says, "He is a manufacturer of broad cloth, and will be much obliged to you for any information with respect to the future price of indigo; in the meantime pray give him any quantity on my account." Now this evidence is open to the same observations that I have made with regard to the authority for the advance of money by the intestate's bankers,—that nothing could be more improbable than that a person should give to another an authority to receive indigo to any amount. Men intending presents, however liberal they may be, wish to be masters themselves of the extent of their own liberality, and not refer it to others to decide to what extent the gifts are to go, however they might trust others as to how far it is safe to go by way of loan; but the difficulty, which I feel arises from the evidence of Mr. *Benett*, who in speaking of a transaction which, it is clear, does not refer to this indigo, but which raises a probability in my mind that Mr. *Farquhar* might intend to make Mr. *Mortimer* a present of some indigo, speaks to having seen some paper, signed by Mr. *Farquhar*, respecting some indigo, following a conversation which, he says, took place about the latter end of *September* 1825. That paper cannot be this letter, because the dates do not correspond, and he speaks of that paper as only having been signed by Mr. *Farquhar*, whereas this exhibit is said to be altogether in his handwriting. The fact is, that the indigo was bought and supplied, not from the stock in the house, for they had not any, but it appears that they authorized a broker

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to purchase it, and that the money charged as the price of the indigo purchased from another person was placed to Mr. *Farquhar's* account by the house, who advanced the money. So far, therefore, the authority is not very strictly complied with, but I think Mr. *Benett* cannot be speaking of this indigo. The difficulty this evidence raises in my mind is, that it is general evidence of the intention of an advance of some quantity of indigo by way of present. But then again, this rests on one of these documents,—the one I last alluded to, and which also includes the indigo. It is unnecessary to repeat the observations which I made upon that document. Now, if the circumstances to which I have adverted are sufficient to deprive that document of all credit, and to show that it is not entitled to be received as evidence against the estate of Mr. *Farquhar*, which, in my opinion, it is not, the observations I have made on it apply as much to the indigo as to the sheep and wool, and upon them I have before observed. There is no evidence of the present of the indigo ; there is an authority to advance indigo on Mr. *Farquhar's* credit for the benefit of Mr. *Mortimer*, and there the case rests. There is no other evidence but this document, which I think cannot be used in support of Mr. *Mortimer's* claim of gift.

The next point is as to a sum of 1,000 *l.*, according to one set of exceptions, and 1,500 *l.* according to the other set of exceptions, stated to be the price of the furniture at *Fonthill* which Mr. *Mortimer* claimed as a present. I will take it at 1,000 *l.*; I think the evidence proves it more satisfactorily as to its value being 1,000 *l.* than 1,500 *l.* Mr. *Coombes* states the value to be 1,000 *l.*; there is other evidence which states it to be higher, but nothing could make it more

improbable that Mr. *Farquhar* could intend to give the furniture as a present than the evidence of Mr. *Phillips*; though he does not speak to the particular furniture in question, he speaks to the mode in which Mr. *Farquhar* dealt with the furniture, and the profit which he determined to make out of it, which makes it extremely improbable that Mr. *Farquhar* could have intended to make a present of any part of it. Mr. *Coombes* speaks to the value of the furniture removed as being 1,000*l.* Mr. *Delves* also speaks to there being certain plate, which is a very important matter of consideration when we are inquiring whether there is evidence to show that this 1,000*l.* worth of furniture was a present to Mr. *Mortimer*. The plate which was removed was worth 279*l.*, and the plate was not claimed as a present, but it is accounted for. The evidence of Mr. *Studley*, who is examined for Mr. *Mortimer*, proves that the furniture was removed, and that it was said to be worth not more than 1,000*l.*, so that upon this part of the case I will take the value at 1,000*l.*, because the witnesses on both sides, *Coombes* and *Studley*, agree in fixing that as the value of the furniture removed. Now to prove that Mr. *Farquhar* intended to supply Mr. *Mortimer* with furniture and money to fit up his house and set up the factory, Mr. *Studley* is examined, and Mrs. *Foxwell* is called to speak to a conversation in which she heard Mr. *Farquhar* say that he wished Mr. *Mortimer* to repair the pavilion, and to take furniture for it from the abbey; that is the whole, with the exception of the evidence of the document to which I am about to refer, and on which the case for Mr. *Mortimer* stands. The plate is not claimed, and the evidence of these witnesses applies to the plate as well as to the furniture. Now we have the exhibit, from which it is con-

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possession from the 1st of May 1813, or from the time when the contract should be actually completed, the bill alleges that the purchaser had refused performance of the contract and acceptance of the title, in consequence of the interest of the purchase-money exceeding the rents of the estate; a statement that can only have any force upon the supposition that the vendor was to have the rents and the purchaser keep the purchase-money till the purchase was completed. Having stated that to be the motive that induced the purchaser not to complete the purchase, and stating the amount of the purchase-money at that date to be 32,490*l.* together with interest thereon, the bill prays that the purchaser may be ordered to pay the same from the 4th of July 1816, that being the time at which the vendor alleged he had made out his title, and was in a situation to call upon the purchaser to complete his contract. Now, it is quite clear that originally the vendor considered that the purchase-money was not to be paid, but that he was to be entitled to retain whatever arose from the estate till he was in a situation to call upon the purchaser to complete the contract, which is now alleged to be the 4th of July 1816. There is another point which is equally clear, and that is, that you have not now to consider at what time it was that the vendor had a right to call upon the purchaser to complete the purchase. We are now upon the original decree, and the question is, whether there is anything that requires alteration. If the decree bears the construction the Respondents contend for, that the possession is not the possession of the purchaser until the contract is completed, and if it shall appear that the purchaser has been the cause of the delay, the vendor had a right, at a prior period, to call upon the purchaser to complete his contract, then it is quite

very conclusive. Mr. *Benett's* evidence is, that he had agreed to purchase part of the estate; that the timber was to be valued to him; that a communication was made as to whether he would object to certain trees being cut down, and finding they were not ornamental trees, and that he was only to pay for those trees that remained, he did not object; that afterwards certain other trees were cut, and then this transaction took place. Mr. *Sewell* proves that Mr. *Mortimer* admitted he was to pay for the timber trees. Mr. *Benett's* is the most important evidence, for he proves that the cutting of the trees was after the date of his contract (the 27th of *December* 1825), and not knowing any difficulty between him and Mr. *Farquhar*, mentioned to him the fact of the trees being cut, which excited Mr. *Farquhar's* surprise and anger against Mr. *Mortimer*, who afterwards came to Mr. *Benett* and expressed his regret that he had mentioned the circumstance, and requested him to communicate to Mr. *Farquhar* that he (Mr. *Benett*) was not displeased at the cutting of the trees; and throughout the whole of that conversation Mr. *Mortimer* represented that the trees were cut by him without Mr. *Farquhar's* authority. It must be considered, therefore, that these trees were not given to Mr. *Mortimer*, and his estate must be held liable for the value of them to the estate of Mr. *Farquhar*, and also for the value of the statue of Alderman *Beckford*, which, it is agreed on all hands, was removed by him."

His Honor accordingly made an order, by which he held the first, second, fifth, and sixth exceptions taken by the plaintiffs, and the first, second, third, fourth, sixth, and seventh exceptions taken by Mr. *J. F. Fraser* to be good and sufficient, except so far as the

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friend, and the other I have shortly to allude to, I entertain some doubt. I entertain some doubt upon the construction of the contract. But for particular terms in the contract, I should not do so; I wish therefore to have time fully to consider the contract. I entertain some doubt also upon the form of the proceedings, and upon the decree pronounced upon the bill, alluding to the prayer of the bill. The other matters require to be carefully looked into, and undoubtedly I should like to have time to do it. With respect to the case of *Blount v. Blount*, which has been quoted, we have sent for Lord Hardwicke's notes, and we have been furnished with the register-book, but we cannot find any note of it.

It was intimated by counsel that they had the whole of the proceedings in *Blount v. Blount*.

July 17. *Lord Chancellor* :—My Lords, this case of *Brooke v. Champernowne* arises out of an appeal from a decree pronounced in the year 1821, respecting the purchase of the reversionary interest of an estate held upon lives, and where the party purchasing such reversionary interest, if he has excluded himself from interest upon the purchase-money until a distant period, has undoubtedly made a very bad bargain. But the question is, not whether it is an advantageous bargain or not, but what it is that the parties have in fact contracted for.

My Lords, the contract itself bore date in the month of December 1812. There had been a prior contract of October 1811, which it is not material to advert to, except as it became incorporated with the contract between the vendor and Mr. Champernowne, the purchaser. By the third condition of

Mrs. *Mortimer* appealed to this House against that order.

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Mr. *Knight* and Mr. *Koe* for the Appellant:—It must be admitted that the task of impeaching a decree of the noble and learned Lord will be one of difficulty. But on the whole case, it is submitted, that, instead of decreeing on the merits, his Lordship ought to have directed an issue, and that this House will ultimately give order for such a direction. In the judgment pronounced by the noble and learned Lord at the Rolls, he admitted the great difficulty of the case. The evidence was extremely complicated. The question, being a question of debt, might be decided in an action of *assumpsit*, in which the administrator would be plaintiff and Mr. *G. Mortimer*, or his representative, defendant. Why was Mrs. *Mortimer* deprived of the benefit of that mode of trial? Surely it was no ground for changing the jurisdiction that the debtor was one of the next of kin of the creditor. This view of the case was not at all adverted to in the Court below, nor was the objection of the Statute of Limitations urged there or before the Master. The Master found the letters, exhibited by Mr. *Mortimer* in his examination, to be genuine, and reported in favour of his claim of gifts, except as to the 20,000*l.*, which he found to be a debt due to the intestate's estate, because Mr. *Mortimer* had been induced to admit that sum to have been a loan. There was a suit pending in the Court of Chancery for setting aside the written agreement containing that admission, as having been obtained by fraud and misrepresentation. The noble and learned Lord, in his judgment in the Court below, deciding in principle against the Master's finding on almost all the points,

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all and every the parties hereto, that the several recited agreements shall be henceforth considered null and void, and the same as if they were cancelled by the several parties interested therein."

Then comes the new contract of December 1812, between Mr. Champernowne and other parties, in these terms: "And these presents further witness, that for and in consideration of the sum of 60,000 *l.* of lawful English money, hereinafter agreed to be paid by Champernowne to Hugh Hammersley and others, he, the said Richard Nowell, doth hereby for himself, his heirs and assigns, by and with the consent and approbation of Richard Smith and others, and also Hugh Hammersley and others, promise and agree to and with Champernowne, his heirs and assigns, that he shall and will, on or before the 1st day of May next ensuing the date hereof, at the proper costs and charges of Hammersley and others, make out a good title." Then it was provided that Champernowne should be entitled to the rents and profits of the premises from the 1st of May, or from such time as the purchase should be completed. It was then provided that the money should be paid on the 1st of May.

Then the contract provided for the payment of "all and every such sum or sums of money for the increased value of the borough, manor, messuages, hereditaments, and premises, or any part thereof, by or in consequence of the death or deaths of any person or persons since the 29th day of September 1811," the date of the original contract.

Then comes the provision with regard to interest. So far the contract has provided, that the rents of the purchased property shall be the rents of the purchaser from the time the contract should be completed.

be dated before the transactions to which they related took place.]

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That was as to a part of one of the exhibits which related to the transaction about Mr. Benett's sheep; and there was no improbability or inconsistency in taking the price of sheep at Weyhill fair for the standard of value of sheep agreed to be sold before the fair was to be held.

It appeared by the evidence for the Appellant, that Mr. *Farquhar* had placed himself in the situation of a parent towards Mr. *G. Mortimer*, and intended to advance him and promote his interest. It was not proved that he ever applied to Mr. *Farquhar* for the loan of any money, or to sell him any goods, and no evidence has been produced to show that Mr. *Farquhar* intended the 10,000 *l.* in question as a loan, or intended to call on Mr. *Mortimer* to account for, or to pay for the goods that he received by the direction of Mr. *Farquhar*. The indigo was forced on him; he was actually forced to become a manufacturer and dyer, in a factory built for the purpose, certainly with bad taste, in view of *Fonthill Abbey*. Mr. *Mortimer* could not well object to the projects which a rich unmarried uncle intended for his benefit; he was certainly his favourite nephew; the testimony of several witnesses concurred to that effect. Looking to the relation between the parties, every one must presume that these favours were gifts and not loans. The evidence treated Mr. *Farquhar* as placing himself *in loco parentis* to Mr. *Mortimer*. Regard being had to the magnitude of Mr. *Farquhar's* fortune, and the affection that he had for Mr. *Mortimer*, the only one of his family that he was desirous of advancing in life, and to the fact, that he did not in his life-time in

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on that being the nature of the contract between them. In a bill which was filed many years ago, for the purpose of carrying it into effect, it was alleged that the purchaser was induced to raise frivolous objections to the title on account of the great benefit he derived from postponing the final completion of the purchase, inasmuch as being a reversionary interest the rents bore but a small proportion to the interest of the purchase-money, and it was alleged that that was his reason for postponing the completion of the contract. The bill alleged "that the prospect of advantage to the purchaser arose from the dropping off of those lives, whilst the rents then actually receivable from the said estates were not nearly equal in amount to the interest of the purchase-money then remaining unpaid, and the interest which the purchaser was to be allowed upon the sums so paid by him as aforesaid; and that by reason thereof it was greatly for the advantage of the purchaser to protract the completion of the said purchase, and the vendors by their bill prayed that Arthur Champernowne might be decreed specifically to perform the agreement of the 11th day of December 1812, and to accept a conveyance of the estate and hereditaments, according to the draft conveyances in the said bill stated to have been prepared and approved of as in the bill mentioned, and that he might pay to Nowell the sum of 32,492 *l.* 18 *s.* 1 *d.*, together with interest thereon, from the 4th day of July 1816," that being the day on which, according to the statement in the bill, the title had been made out and perfected; and the plaintiffs, by their bill, offered to allow interest upon the sums of 3,000 *l.* and 15,000 *l.*, paid in part of the purchase-money, up to the time of the payment of the residue of the said purchase-money. The plaintiffs never alleged in their bill the claim which they have since by this appeal thought fit to

and Mr. *E. D. Daniel* appeared for the Respondent Mr. *J. F. Fraser* : but all the Respondents being held, after explanation, to be interested alike in supporting the order appealed from, Mr. *Pemberton* and Mr. *Wigram* only were heard for them.

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They submitted that there was conclusive evidence applicable to each of the transactions in question, that the moneys and property, which were the subject of contest between the parties, were advanced to *G. Mortimer* by the intestate, as loans, or came into his possession under circumstances which rendered him accountable, and his estate was, therefore, properly charged with them. The examination put in by Mr. *Mortimer*, and the case made by it, were wholly disproved by the evidence adduced by the Respondents. The operation of the Statute of Limitations as to any of these advances, was prevented by the litigation in the Ecclesiastical Court respecting the alleged will of Mr. *Farquhar*. A court of equity had a right to adjudicate on the evidence produced in a suit like this, being for the administration of an intestate's estate ; and if it entertained no doubt upon the facts, it would not direct an issue to a jury. *Nicol v. Vaughan* (c).

The three pretended letters stated in Mr. *Mortimer's* examination, and relied upon as evidence of gifts from the intestate, were proved by the evidence to be counterfeit documents. Two of them were obviously, upon inspection, forgeries or otherwise fabricated writings, and the third was falsified by *G. Mortimer's* own declaration upon oath, made when he was qualifying himself to be one of the intestate's administrators.

Mr. *Knight*, in reply, insisted that an order direct-

(c) 1 Clark and Finnelly, 49.

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so that the purchaser shall have to pay not only the sum he agreed, 70,000 *l.*, but also the increased value which the estate has obtained by the wearing of lives," the effect of which would be to convert the purchase of a reversion into the purchase of an estate in possession, and that not by the contract of the parties, but by a valuation made by the Court. The plaintiffs never before thought that such was their right; they never asserted it by their bill; the decree gave them that which they stipulated for, and directed an inquiry into the increased value from the dropping of lives.

My Lords, the complaint made by the petition of appeal is thus stated: "The plaintiffs conceiving themselves aggrieved by the decree of the 24th of February 1821, and being advised that, according to the true construction of the agreement, they are entitled to interest on the remainder of the purchase-money from the 1st day of May 1813; and that the Respondents, on the other hand, are entitled to the rents and profits of the estate and premises, including the increased value of the estate from the dropping and wearing of lives from that period; and therefore that the said inquiry as to the dropping of lives from the 1st day of May 1813 is erroneous, and ought not to have been extended beyond the period that elapsed from the 29th day of September 1811, down to the 1st day of May 1813; but if such inquiry should appear to your Lordships to be correct, then the plaintiffs in the said lastly-mentioned causes are advised and humbly submit that the inquiry should be extended to the wearing of lives, and the increase of the ages of the persons for whose lives any part or parts of the estates and premises was or were held on the 29th day of September 1811, as well as to the dropping of the lives." My Lords, I have before adverted to the contract which excludes the claim of

for your Lordships to take, is to let the case stand over for a few days in order to give an opportunity of looking into the evidence.

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Lord *Brougham*, this day, after stating the proceedings that had been taken in the Court below and in the Master's office, said the state of facts and charge carried in, the interrogatories that were exhibited, Mr. *G. Mortimer's* examination upon them, and the Master's report and the exceptions allowed to it, raised the question which has been, almost alone, argued at your Lordships' bar, whether or not considerable sums of money and certain goods, principally a large quantity of indigo of considerable value, which had, under Mr. *Farquhar's* authority and direction, come into the possession of Mr. *G. Mortimer*, had been so put into his possession by way of loan only, or by way of gift, and whether therefore, Mr. *Mortimer*, to the amount of those sums and for the value of those goods, was or was not accountable to the estate of Mr. *Farquhar*, under the administration. Now, my Lords, both at the time when this case was argued and since, I have very carefully considered the evidence on both sides, upon which the proposition of each party was sought to be maintained; and I have come to the opinion, without any hesitation whatever, that the judgment of my noble and learned friend in the Court below, was well founded, and that Mr. *G. Mortimer*, and the Appellant, as representing him and his estate, was and is accountable to the estate of Mr. *Farquhar*, to the amount of those several sums of money, and the value of those goods stated in the exceptions to the Master's report.

I purposely abstain from entering into the evidence in this case, and from giving any opinion upon the

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June 6. 12.

A P P E A L

FROM THE COURT OF CHANCERY.

The Directors of the EAST INDIA COMPANY *Appellants.*

JOHN CAMPION, DAVID COLVIN, WIL-
 LIAM CRAWFORD, and JAMES GA- } *Respondents.*
 THORNE REMINGTON - - - - -

*Bill of Inter-
 pleader.
 Jurisdiction.*

The Directors of the *E. I. Company* having in their hands the sum of 5,577 *l.* arising from the sale of goods consigned to *B. & Co.* on which *C.*, owner of the ship on board of which the goods had been brought into the *E. I. Company's* docks, claimed to have a *lien* for freight, paid 2,000 *l.*, part of said sum, to *B. & Co.* on account, and 849 *l.* to *C.* An action having been afterwards brought by *C.* for 1,908 *l.* the residue of his claim, and *B. & Co.* having threatened an action for the whole balance remaining in the Directors' hands, the latter filed a bill of interpleader against *C.* and *B. & Co.*, and paying that balance into Court, obtained an injunction to restrain the proceedings at law. The cause was heard and a decree pronounced, directing an issue to be tried at law between *C.* and *B. & Co.*, in which *C.* ultimately established his claim, the Directors taking no part in that proceeding. The sum paid into Court being insufficient to answer *C.'s* claim with the interest that had accrued thereon during a protracted litigation, the Directors were ordered, on the hearing of the cause on further directions, to pay into Court, as subject to *C.'s* lien, the 2,000 *l.* which they had already paid to *B. & Co.* HELD, by the House of Lords, that this latter order was inconsistent with the principles of an interpleader suit; that the plaintiffs in that suit having paid into Court under its order the whole sum which was the subject of interpleader were discharged from further obligation; that the protracted litigation which increased the claim of

WRIT OF ERROR

FROM THE COURT OF EXCHEQUER CHAMBER.

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May 18, 19.
June 27.
July 15.

GEORGE GARLAND, Esq. - - *Plaintiff in Error.*

THOMAS CARLISLE, Assignee of
the Estate and Effects of
GEORGE VALENTINE LEONARD,
a Bankrupt - - - - - } *Defendant in Error.*

A sheriff (before the passing of the 6 Geo. 4, c. 16) having no notice of a previous act of bankruptcy committed by a trader, seized his goods under a *fi. fa.*, but withdrew upon an arrangement entered into between the execution creditor and the trader, receiving however his poundage in the ordinary manner. A commission was afterwards issued on this act of bankruptcy. HELD by the Lords (Lord Denman *diss.*) that the assignees might maintain trover against the sheriff for the goods seized.

Bankrupt.
Sheriff.

Semble, that the receipt of poundage was evidence of a conversion by the sheriff.

THIS was a writ of error brought to reverse a judgment of the Court of Exchequer Chamber, of Michaelmas term, 1833. The action was in trover, brought in his Majesty's Court of Common Pleas, by the Defendant in Error, as assignee of the estate and effects of G. V. Leonard, a bankrupt, against the Plaintiff in Error, late sheriff of the county of Dorset. The cause was tried before Mr. Justice Littledale, at the summer assizes at Dorchester, in the year 1825, when a verdict was found for the then Plaintiff, the said Thomas Carlisle.

That verdict was set aside, and upon a new trial before the same learned Judge, the jury found the

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partners therein ; and the said *David Colvin* was also a partner in the said firm of *Colvin & Co.*, at *Calcutta*, who were the general agents and correspondents there of *Bazett & Co.*

Messrs. *Colvin & Co.* duly received the outward cargo, as the agents of *Gooch*, and sold the same in *India* on his account ; and they invested the net proceeds, or part thereof, in the purchase of 489 bales, and 22 half bales of cotton wool, which they shipped on board the "*Hero*," consigned to *Bazett & Co.* ; and bills of lading for the same were made and signed by Mr. *Price*, the master of the ship, by which the said cotton wool was to be delivered to *Bazett & Co.*

In April 1818, the "*Hero*" arrived on her homeward voyage in the *East India Docks*, and the goods and merchandize on board, including the said cotton wool, were deposited in the warehouses of the Appellants, under the provisions of the Act 54 Geo. 3, intituled, "An Act for amending and enlarging the Powers of two Acts made in the 43d and 46th years of Geo. 3, for the further Improvement of the Port of *London*, and making Docks and other works at *Blackwall*, for the accommodation of the *East India* Shipping in the said Port." Shortly before the arrival of the "*Hero*" in *London*, *Gooch* had stopped payment, and he was afterwards declared a bankrupt. At the time of the ship's arrival, *Campion* claimed to be due to him for freight, in respect of her aforesaid cargo, the sum of 5,605 *l.* 5 *s.* ; and on the 18th of *April* 1818, he caused to be delivered to the Appellants a proper notice in writing to preserve his *lien* for the freight on the cargo under the said statute.

In a letter from *Colvin & Co.* to *Bazett & Co.*, dated 2d October 1817, enclosing the invoice and bills of lading, the proceeds of the said bales of cotton

on the 14th of the same month, declared a bankrupt. That on the 29th of the same month an assignment of the estate and effects of the said bankrupt was made by the commissioners under the said commission to the said plaintiff. That in the beginning of February 1825 a demand was made of some of the goods seized, but they were refused to be delivered up. But whether," &c.

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This special verdict was argued before the Court of Common Pleas in Hilary term, 1831, and the Court delivered judgment in favour of the Defendant in Error (*a*). On the 10th of August 1832, a writ of error to reverse this judgment was brought into the Exchequer Chamber, where the case was argued on the 17th of June 1833; and on the 26th of November in the same year that Court affirmed the judgment of the Court of Common Pleas (*b*).

The case was then brought by writ of error to this House. It was argued by Sir F. Pollock and Sir W. Follett for the Plaintiff in Error, and by Mr. Serjeant Taddy and Mr. Serjeant Bompas (with whom was Mr. Ball), for the Defendant in Error. The arguments took place in the presence of the Lord Chancellor, Lord Wynford, Lord Brougham, and Lord Denman, who were assisted by the Judges of the common law courts. As the case has already been fully reported, and as the points for argument and the authorities chiefly relied on are noticed in the subjoined opinions of the learned Judges, it has not been deemed necessary to report the arguments of counsel here.

At the close of the arguments, the following ques-

(*a*) 7 Bingh. 298; 5 Moore & P. 105.

(*b*) 3 Tyrr. 705; 2 Crom. & Mee. 31; 4 Moore & Scott, 24.

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from the proceeds of the sale of the different goods, but not to be paid to Mr. *Campion* until it shall have been legally decided to whom such freight is strictly due. We have the honour to be, sir, your most obedient servants, *Bazett, Farquhar, Crawford & Co.*”

The Appellants, on the 17th of *June* 1823, filed their bill of interpleader in Chancery against *Campion*, and against the other Respondents and their late partners, *Bazett & Farquhar*, which bill was afterwards amended by making *Edwin Saville, Thomas Milroy, and Thomas Farmer*, as the assignees of *Gooch*, under the commission of bankrupt awarded against him, parties defendants thereto. The bill stated, amongst other things, certain provisions of the said Act of 54 G. 3, relating to the landing and sale of goods brought from the *East Indies* to the *East India Docks*, and whereby it was provided that the owners of any vessels from which any such goods should have been landed, should have the same lien upon the net proceeds of them for the freight, as they should have been entitled to upon the same goods before the landing thereof, if they should have given notice in writing of their claim before the net proceeds should be paid over to the consignees or owners of the goods. This bill also stated the arrival of the said ship in the *East India Docks*, and the depositing of her cargo, including the cotton wool, in the Appellants' warehouses, and the conflicting claims and notices received by them from *Campion* and from the Firm of *Bazett & Co.*, and that the said bales of cotton wool were afterwards sold at the Appellants' public sales, and produced the sum of 5,577*l.* 12*s.* 3*d.*, for which the Appellants accounted with *Bazett & Co.*, and that on the 9th of September 1818, the Appellants, with consent of *Campion*, paid the firm of *Bazett & Co.*, 2,000*l.*

1824, at which time the 5 Geo. 4, c. 98, had passed, but had not come into operation, except for the special purposes referred to in the 133d section. The decision of the matter in debate must therefore turn upon the previous statutes, especially that of 13 Eliz. c. 7, and on the course of decisions which have taken place in reference to those statutes. The first statute, the 34 & 35 Hen. 8, c. 4, authorises the disposition of the bankrupt's property for satisfaction of his creditors, and gives the same effect to the transfer as if it were a conveyance by the bankrupt himself. There is nothing in this Act showing any intention that its enactments should have a retrospective effect. The 13 Eliz., c. 7, after authorising the appointment of commissioners for managing and disposing of the bankrupt's estate, directs that every direction, order, bargain, sale, and other thing done by the persons so authorised, shall be good and effectual in the law against the said offender or offenders, debtor or debtors, &c., and against all other person or persons claiming by, from, or under such offender or offenders, debtor or debtors, by any act or acts had, made, or done after any such persons shall become bankrupt. The object of this statute was undoubtedly to give the commissioners, when appointed, a retroactive power, so as to enable them to avoid incumbrances and transfers of the bankrupt's property happening subsequent to the act of bankruptcy. To what extent, and as to what persons this power was intended to operate, is the main subject of the present inquiry. The 9th section of the 21st Jac. 1, c. 19, has not, as it seems to me, any very direct bearing on the present question. The lands of the bankrupt were at that time bound by a judgment from the day to which the judgment related; and when a *fi. fa.*

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bill, said, among other things, that he believed the said 511 bales of cotton wool were the property of *Gooch*, and that *Colvin & Co.*, of *Calcutta*, and *Bazett & Co.* were aware that he (*Gooch*) had chartered the said ship, and that a large balance was due to this Respondent under the charter-party; and this Respondent believed that the Appellants paid out of the proceeds of the sales of the said cotton wool the sum of 2,000*l.* to *Bazett & Co.*, but he denied that said payment was made with his consent, and he admitted that the Appellants paid him 849 *l.* 5 *s.* 10 *d.* out of the proceeds of the said cotton wool with consent of *Bazett & Co.*; and this Respondent denied that the Appellants were ever ready and willing to pay the balance of 2,585 *l.* 0 *s.* 10 *d.* to the party entitled thereto, for he said that he, being entitled to the greatest part thereof, requested the Appellants to pay the same or so much thereof as he was entitled to, he offering at the same time to give them ample indemnity for any loss they might sustain by having paid the same to him, but the Appellants refused to pay the same to him, and he was informed, on making such application, that they would not pay the same to him upon any indemnity whatever.

The defendants, *Bazett*, *Colvin*, *Farquhar*, *Crawford*, and *Remington*, by their answer, admitted the said goods were sold by the Appellants, and produced the net sum of 5,434 *l.* 6 *s.* 8 *d.*, and they believed the said ship to belong wholly or in part to *Campion*; and they admitted that the Appellants accounted with them for the monies produced by the sale of the said goods, and paid them, with the consent of *Campion*, the sum of 2,000*l.*, and with their consent paid *Campion* 849 *l.* 5 *s.* 10 *d.*, that sum being the amount of freight for the said bales of cotton wool; and that

largely and beneficially for the aid, help, and relief of the creditors. If such is the case with the execution creditor, what is to be said as to the sheriff? The ground on which his case was sought to be distinguished in argument from that of the execution creditor was this, that he claimed nothing but to execute the King's writ, and could not strictly be said to claim anything. This mode of treating the subject seems to savour a little of verbal refinement, and strikes the mind with an impression as if it were more specious than solid; for it occurs at once to ask, if the sheriff claim nothing in the goods, why does he intermeddle with them at all? It seems to me that he does claim a right in the goods; namely, a right to seize and sell them; and that right is derived out of the debtor's right to them. He may, then, without any impropriety of language, be considered as falling within the description of a person "claiming by, through, or under the debtor," if such appeared to be the intention of the Act of Parliament. But, if the general object and scope of the Act would be satisfied by putting a different construction upon the clause, I do not think it would be doing any great violence to the language of it, if we were to say that the Act was intended only to apply to persons who claimed an interest in the goods for their own benefit. The object of the Act of Parliament is, to promote an equal distribution of the assets amongst all the creditors. To effectuate this object, it is essential that an execution creditor who has laid hold, for his own use, of a portion of the fund, should be made to refund it. But the case of the sheriff is different. He does not keep the money in his hands. He is a mere instrument of transfer; and it is by no means necessary, in order to carry out the object of the bankrupt laws, that he should be

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liable to pay back money which is no longer in his hands. The policy of the bankrupt laws is satisfied by holding that the party to whom he has paid the money over is liable to refund it. It seems to me therefore, that although the words of the clause in question are large enough to include the sheriff, and do in their natural sense include him, yet that it may be construed in the more restricted sense without doing much violence to the terms in which it is expressed. An argument in favour of the more restricted construction has been urged at your Lordships' bar, which appears to me to be of considerable weight. It was said that, if after an act of bankruptcy committed, a debtor of the bankrupt, having notice of the act of bankruptcy, pays his debt, he will be liable to pay it over again to the assignees, if a commission should afterwards issue; yet if he is sued before the commission issues, he cannot defend himself on the ground that an act of bankruptcy has been committed, and that a commission *may* issue. *Prichett v. Downe* (c) was cited in support of these positions; and *Foster v. Allanson* (d) is to the same effect. It was said further, that if the bankrupt should sue for the debt and recover judgment, and the debt should be thereupon paid by the debtor in satisfaction of the judgment, the assignees under a commission subsequently issued could not claim to be paid over again. The law was certainly so laid down in *Foster v. Allanson*, and has not, as far as I am aware, ever been called in question. Here then, is a striking exception to the universality of that rule of the bankrupt law by which all the property and rights of the bankrupt are by relation

(c) 3 Camp. 131.

(d) 2 T. Rep. 479.

transferred to the assignees, in all their entirety, as they existed at the time of the act of bankruptcy. On what principle does this exception rest? I am not able to find any satisfactory one, other than that which was contended for in argument at the bar, that what the law compels a man to do, it will if possible justify him in doing. This principle is so entirely consistent with reason and the plainest dictates of justice, that it ought not lightly to be departed from. It cannot, indeed, be contended that it is of force sufficient to control the distinct and positive enactments of a statute; but, where a statute admits of two constructions, it may furnish an argument of considerable weight for the adoption of the one in preference to the other. It is obvious that this argument, be its weight more or less, is directly applicable to the case of the sheriff. He is bound to obey the writ; he is liable to an attachment if he does not. In the construing of an Act of Parliament, some degree even of astuteness might be pardoned, in endeavouring to avoid such a scandal to the law as must result where a man has been compelled to do a certain act, and is afterwards punished for doing it; where he is compelled to pay, either in purse or in person, for having done an act which he had been compelled by a similar legal necessity to perform. If these considerations had induced the courts of law to adopt what I have called the more restricted construction of the clause in question, I should have thought them well warranted in doing so; and it seems to me, that in the early cases the courts leaned to that construction. But I am constrained to say, that, in my judgment, the great body and weight of authority is on the other side. I do not propose to go in detail through the whole of the cases; they have already on former occasions been

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sifted with a degree of learning which leaves nothing further to be said on either side of the question. Whatever conclusion may be come to with respect to the earlier decisions (which are, for the most part, but in differently reported), it is indisputable that, for many years back, the decisions have been uniform, that the sheriff is liable. The case of *Potter v. Starkie*(e) decided in the Exchequer in 1807, is of itself an authority of great weight. It was, as I have learned from one of my learned brothers now present (himself then counsel for the Plaintiff), elaborately argued on behalf of the sheriff by a most able, acute, and learned person (Sir John Richardson), and before Judges perfectly conversant in the law applicable to the question in debate. It is stated in 4 M. & S. 280, that the decision in that case was considered as following from the case of *Cooper v. Chitty* (f). But it is not to be understood from this statement that the difference between the two cases escaped the attention of the bar and the bench. On the contrary, in the case of *Lazarus v. Waithman*(g) Mr. Justice Richardson, when speaking of the case of *Potter v. Starkie* by the name of *Lyon v. Lamb*, informs us that the difference between that case and the case of *Cooper v. Chitty* was pointed out and insisted on, but that the Court held that the property was changed and vested in the assignees, by relation, from the time that the act was committed. This decision must therefore be looked upon as the deliberate judgment of the Court of Exchequer expressly upon the point now in debate. That decision appears to have been acted upon by Lord Ellenborough in 1813, in the case of *Wyatt v. Blades*(h). It was followed, in 1821, by the Court of Common Pleas in the case of *Lazarus v. Waith-*

(e) *Vide infra*, p. 714.

(f) 1 Burr. 20.

(g) 5 B. Moore, 19.

(h) 3 Camp. 396.

man; and again, by the same Court, in the case of *Price v. Helyar* (*i*); and, in 1831, by the Court of King's Bench in *Dillon v. Langley* (*k*). Now, if it were admitted, which is open to some dispute, that the earlier decisions are at variance with the modern ones, the latter are so precise, and have now been considered for so many years as established law, that, even if less capable of being upheld upon the express words of the statute than I think they are, they ought not now to be overturned.

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The law is pre-eminently a sensitive and practical science. Where there is a real grievance, it never fails to show itself, and usually either works out a remedy for itself, or is remedied by the Legislature. However great the anomaly may be (theoretically considered) in holding the sheriff liable in the case under consideration, the practical inconvenience has never been found to be very serious. If the sheriff is called upon to pay over to the assignees money which he has already paid to the execution creditor, he may repay himself at the expense of the creditor; or if, before he has paid over the money, he has good reason to apprehend a bankruptcy, he may apply to the party suing out the writ for an indemnity, or to the Court for time to return the writ. How little of real practical grievance there is may be inferred from the well-known fact, that the office of undersheriff is in general request, and is looked upon as an office of emolument sufficient to countervail any risk it may bring with it. The practical evil, on the other hand, is of no small amount, when the courts of law depart on any but the most solid grounds from an established course of legal precedents. The importance of certainty with respect to the rules of law ought never to

(*i*) 4 Bing. 597; 1 M. & P. 541. (*k*) 2 B. & Adol. 131.

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The Master, by his report bearing date the 24th *March* 1832, certified that he found the freight and primage due to the Respondent *Campion*, by virtue of the said charter-party, amounted to the sum of 5,955*l.* 5*s.*, and he found that he, *Campion*, had received at different times various sums of money on account of such freight and primage, and the interest thereof, and he had computed interest after the rate of *five per cent. per annum*, on the respective balances which from time to time remained due in respect of such freight and primage, after deducting the sums received on account as aforesaid; commencing such computation of interest from the 1st *September* 1818, and continuing the same to the date of that his report, and he found that there then remained due to the Respondent *Campion*, under and by virtue of the said charter-party, and for interest computed as aforesaid, the sum of 3,909*l.* 12*s.* 6*d.*

By an order made by the Master of the Rolls the 25th of *April* 1832, it was ordered that the sum of 2,755*l.* 5*s.* 2*d.* cash in bank, to the credit of the case, should be paid to the Respondent *Campion*, pursuant to the said decree of 15th *February*, and to the Master's report, security being previously given by him to refund the same, in case the Court should thereafter so direct. And it was also ordered that the other Respondents should give like security to pay 1,154*l.* 7*s.* 4*d.*, the residue of the money ordered by said decree to be paid by them to *Campion*, in case the said decree should be affirmed on appeal.

The other Respondents, *Colvin*, *Crawford* and *Remington*, appealed to this House against the said orders of the 30th of July 1831 and the 18th of January 1832, and the said decree on farther directions, of the 15th of February 1832. That appeal

thinking at no great length, for I do not propose to review the authorities upon the subject. Speaking in this House, it seems enough for me to say that the result of my examination of the cases is this. I do not find a balance of authority so preponderating as to be absolutely conclusive on my judgment either way. Putting, however, the authorities which are in accordance with my own opinion at the very lowest possible estimate, and speaking of them in a way in which even those who differ from them cannot but concur, for they are numerous, of great weight, entitled to high respect, and have been (which is most important) acquiesced in generally by the legal profession, and acted on for many years, still if I determine my own opinion independently of them, and upon principle alone, they will warrant me in the satisfactory feeling that I am not setting up that fallible opinion so formed against all the authority bearing on the case.

Considering this question as one that is to be answered on principle, I ask myself what are the principles to which I am to apply for an answer ; and that raises the further point as to what is the nature of the question itself. If it be a question of common law, in the absence of direct authority, I must look to legal analogy : and considerations of moral right and wrong, of general expedience or inconvenience, may be properly allowed to enter largely into the argument. If it be a question of statute law, the inquiry becomes one of a much more restricted range : it is then simply a question of construction, and none of those general considerations to which I have alluded have any place, except so far as they serve to illustrate the meaning of the language which the Legislature has chosen to employ ; and it is obvious, upon this principle, that, where the legal, ordinary, and grammati-

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The issue was tried in 1835, and a verdict was again found for *Campion*, subject to a special case. Such case was argued in the Court of Common Pleas in May 1836, when judgment was entered up for *Campion*. All the proceedings in the cause from the decree of the 17th of *April* 1826 were between *Campion* on one side, and the other Respondents and their late partners on the other.

On the 6th of July 1836 the cause came on to be heard before the Vice-Chancellor on the said verdict and for further directions, and as to the matter of costs reserved, of which *Campion* caused notice to be served on the Appellants, and his Honor ordered that it should be referred to the Master to take an account of what was due to *Campion*, under the charter-party, and to compute interest thereon, at the rate of 5 *l. per cent per annum*, from the 1st of

order of the present Vice-Chancellor. So the matter will be thus—there will be a new trial by reversing in part the order discharging the order of Sir *Anthony Hart*, and thereby restoring that part of his order. But there will be no reversal of the discharge of that part of the order which granted the commission and stayed the new trial till after the return of the commission. The *laches* of the party asking the commission clearly justified that part of the order of the present Vice-Chancellor and myself, and justifies your Lordships in affirming that part of our order and discharging the other part, but it ought not to go beyond the particular matter with which it appears to interfere and the damage produced to the other party. The delay of the commission was totally unaccounted for; I have never heard more frivolous reasons given for anything, but that ought not to affect the new trial of the issue when the conscience of the Court is not satisfied. There will then be no commission, but a new trial without any delay of it, and added to this a power, as stated in the argument of counsel at the bar—a power to the Appellant to use the Judge's notes at the former trial as to the evidence of the witnesses who are dead or should be beyond sea when the new trial takes place, and in case proper admission is not entered into by the other parties, I also propose to give a power to the plaintiff in the action to apply for the 2000 *l.* to be paid into Court. Of course there will be no costs."

Judgment of the Court below reversed in part and affirmed in part.

the writ. This argument, I confess, seems to me rather fanciful than sound. When the sheriff is either insisting upon his right to take or to hold the goods or the proceeds, or justifying the act he has done in the seizure of them, I do not know any general term more appropriate to describe his situation than that which the statute uses ; and if the right to take or to hold depends, as no doubt it does, on the title of the bankrupt, surely he claims under him, although not by descent, conveyance, or any mode of voluntary transmission. If the execution creditor, who sets the sheriff in motion, claims under the bankrupt, if the sheriff's vendee of the goods claims under the bankrupt—and it is not disputed that both do—can their case as to this be put upon any principle which will not include that of the sheriff? Do you not in fact destroy their respective titles, if you show that the goods were not the bankrupt's when seized?

But, secondly, it is said, that, at all events, the claim does not arise by virtue of any act done by the bankrupt. The answer is most obvious, that the statute says nothing of the act being done by the bankrupt ; the words are—"any act or acts had, made, or done after any such person shall become bankrupt." Nor can I think that those other words ought to be imported into the statute ; if they were, the objection now relied on would apply not merely to the sheriff but to the execution creditor, who yet is admitted to be within the clause. He does not claim necessarily under any act done by the bankrupt, any more than the sheriff. If these words, "by the bankrupt," are not to be imported into the statute, the difficulty does not arise ; for, the issuing of the writ, the delivery to the sheriff, the seizure by him, are all acts done subsequently to the bankruptcy. This section of the Act of Parlia-

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this House, praying a reversal of that part of this order, whereby it is declared that, in case any balance should be found due to *Campion* on the account thereby directed, he (*Campion*) had a lien for the amount thereof on the sum of 2,000 *l.* in the pleadings mentioned, and whereby it is ordered that the Appellants should pay into the Bank the sum of 2,000 *l.*; and whereby it is provided that the same was to be without prejudice to any question of interest or lien on the interest of the said sum of 2,000 *l.*, and whereby it is provided that *Campion* is to be at liberty to apply to the Court respecting the interest of the said sum of 2,000 *l.*, as he might be advised. And the said petition of appeal further prayed, that *Campion* should pay to the Appellants the costs of their appearance at the said hearing on further directions.

The *Solicitor-General* and Sir *Charles Wetherell* for the Appellants (Mr. *Wyatt* and Mr. *E. J. Lloyd* with them).

This being a mere suit of interpleader, limited to the sum of 2,585 *l.* 0 *s.* 10 *d.*, it was irregular, and at variance with the practice of the Court in suits of this description, to give any directions relative to the sum of 2,000 *l.*, which formed no part of the subject of interpleader, or to give any relief as against the Appellants, by a decree made on the hearing for further directions. The Court had not jurisdiction to adjudicate on more than was the subject of the interpleader bill. The defendants to that bill might file a cross bill against the *East India Company*, if they desired payment to be made by them into Court of more money than was the subject of this suit. The Appellants were in effect dismissed from the cause

is liable in trover only, or in assumpsit, in which the value of the goods is sought to be recovered, and not in trespass. But no lawyer maintains in terms that the argument of hardship can be relied on, where the meaning of the statute is unambiguous. Those therefore, who contend that the sheriff is not responsible, shape the argument differently; they rely on the ministerial character of the sheriff—that he acts only in strict obedience to the orders of the court, whose officer he is, and whose judgment he executes and is bound to execute: reason and justice, and well-recognized legal principles, they say, require, that in so doing, he should be borne harmless; that the relation to the act of bankruptcy is but a fiction of law, and must not be allowed to work wrong; and therefore, that, however general the words of the statute are, they must be read with an implied exception as to him.

I state the argument very shortly, not from any wish to diminish its real strength, but because your Lordships are fully aware of all the particulars which are involved in the simple proposition that all that the sheriff does he does in the strict performance of his duty, and under orders. Still, as it seems to me, the substance of the case is merely hardship and unreasonableness, and that the only grounds of law advanced cannot be safely relied on.

First, is this doctrine of relation a mere fiction of law? The statute law in substance enacts that a trader owing a debt or debts of a certain amount, and committing an act of bankruptcy, holds thenceforward his goods by a defeasible title; and that, if a certain other event happens, his title shall be defeated from the date of such act of bankruptcy, and this as regards, not merely himself, but every one claiming interme-

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diately under him. In what sense is there any fiction here? No fact is supposed to exist contrary to the truth: the assignees have no possession supposed to be in them at a time when it was actually in the bankrupt; but the law, making his title defeasible from a certain moment, avoids, in favour of the assignees, the title of all those who claim under him by any intermediate acts. The case of the disseisor and disseisee put by the Chief Justice in *Liford's* case (*l*), is an illustration in point; by the disseisin the disseisor acquires the freehold against all the world, and among others the disseisee, so long as the disseisin continues; but if the disseisee re-enters, *as against the wrong-doer or his servants*, the law supposes the freehold to have always remained in him, and he may maintain trespass for the fruits taken while he was disseised. Now, this supposes a possession contrary to the fact; and the law will not allow that to prevail against any one coming in by title *bond fide* under the disseisor, but gives the whole remedy against him. Here is a fiction of law, and therefore moulded by law to meet the ends of justice: but, if the Act of the Legislature, upon which this part of the common law must in legal contemplation be supposed to rest, were now in the statute book, in order to effect its purpose, its language must be very different from that of the statute now in discussion: instead of simply saying that the disseisee's title shall prevail, it must have enacted what would, on the face of it, have appeared to be a fiction, namely, that, as against the disseisor, the disseisee after re-entry shall *be deemed* to have been seised and in possession at a time when he was notoriously not so.

(*l*) 11 Rep. 51.

I conceive, therefore, that this is not, in fact, any fiction of law ; but, if it be, it is one enacted by the express words of the Act of Parliament, and therefore we cannot mould it as we might a fiction of the common law. I may here revert to the case I have just put, and suppose the Legislature to have enacted, that, *as against all persons*, the disseisee, after re-entry, should be deemed to have been in possession : in that case, could any sense of hardship or injustice warrant the expounders of the law from holding that he might not maintain trespass for the mesne profits against the disseisor's vendee ?

But, lastly, can we read the statute with an implied exception in it in favour of the sheriff ? I am aware of the lengths to which our predecessors in former times have thought themselves justified in going, when dealing with the concise language and general terms of ancient Acts of Parliament. I will not stop to inquire whether in all the instances that might be cited their course was to be justified, or, in precisely similar circumstances, their example to be followed ; but, for one, I think the principle which limits my duty in regard of statutes of so late a date as those of Elizabeth to that of exposition so clear and paramount, that I shall never think myself justified in taking a case out of the operation of a statute which falls within its plain and unambiguous language. I beg to draw attention to the precise words in which I lay down this rule for my own guidance : it is one thing to imply as written in a statute all that is absolutely necessary to give the written words a sensible operation ; it is another to exclude any case which the words in their ordinary legal and grammatical sense embrace. And this I may say in addition—that, upon those who call

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they had paid the 2,000 *l.* in question with the consent of Mr. *Campion*; but the Appellants ought to have stated the case truly, and thereupon ought to have brought that sum into Court in the first instance.

This matter has been twenty years in litigation. There were at first three sets of claimants, *Campion* and the other Respondents, and the assignees of *Gooch*, who have abandoned their claim. *Campion's* action, had it been allowed to proceed, would have decided all the questions. He claimed the amount of his charter-party: he never asked less. The injunction being to restrain Mr. *Campion* from proceeding with the action until the hearing of the cause *or* further order, though he put in his answer and the cause was heard, the injunction did not drop, as no further order was made, and he was not able to go on with the action, which is still pending. But the matter was fully investigated at the trial of the issue, in which Mr. *Campion* completely succeeded.

Had the Appellants stated in their bill, as the truth was, that they had paid the 2,000 *l.* to *Bazett & Co.* without *Campion's* consent, they would be compelled to pay that sum into Court on obtaining the injunction. By the delays interposed to Mr. *Campion's* prosecution of his just demand, and by the postponement of the payment to him, he is now entitled to more than his original demand, which is increased by the costs and the interest that accrued. The observations of Lord Eldon in *Pulteney v. Warren* ^(e) were most applicable to this case: "If there be a principle upon which courts of justice ought to act without scruple it is this, to relieve parties against that injustice occasioned by its own acts or oversights at

(e) 6 Ves. 73; see pp. 92 & 93.

To this is to be added what Sir John Richardson observed in the case of *Lazarus v. Waithman* (*m*), "that the law on this question has long been settled, and has frequently occurred of late years at *Nisi Prius*." Having adverted generally to the decisions, I proceed at once to an examination of them. The first in order is the case of *Potter v. Starkie*, of which some notice is to be found in 4 M. & Sel. 260, and also in Mr. Selwyn's Treatise on the law of *Nisi Prius*, 8th edit. p. 1431. It has been frequently alluded to, and generally for the purpose of receiving a ready refutation, viz. that it purported to proceed on the authority of *Cooper v. Chitty* (*n*), whereas that authority, properly understood, is directly opposed to it. If the case of *Cooper v. Chitty* be founded on two principles—first, that the property, upon assignment, vests in the assignees from the date of the act of bankruptcy—and secondly (as Lord Mansfield expressly puts it in one part of his judgment), that the taking was not lawful, because the goods were *then* the goods of a third person, and so there was a conversion, then is the case of *Potter v. Starkie* in strict accordance with *Cooper v. Chitty*. If, however, the latter case (never denied to be law) can only be sustained by the sheriff having had notice of the bankruptcy when he sold, then the Court of Exchequer, though they agreed with the *decision* in *Cooper v. Chitty*, were opposed to that part of the *reasons* for the judgment; and, in my humble opinion, rightly. Seeing, however, that the decision in *Potter v. Starkie* is of some importance, having been upon a state of facts which completely coincides with the present, I am desirous to furnish your Lordships with the best information that can be

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(*m*) 5 B. Moore, 19.

(*n*) 1 Burr. 20.

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The *Solicitor-General* replied.

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The *Lord Chancellor*:—This is an appeal on behalf of the *East India Company* against an order of the Vice-Chancellor, by which it was ordered that the plaintiffs in the interpleading suit should pay into the *Bank of England*, with privity of the Accountant-General of the Court of Chancery, the sum of 2,000 *l.*, without prejudice to any question of interest or *lien* on the said sum; and the defendant *Campion* was to be at liberty to apply to the Court respecting the interest of that sum of 2,000 *l.*, as he might be advised, and any of the parties were to be at liberty to apply to the Court, &c. The question now arises upon a legitimate subject-matter of an interpleader suit. The *East India Company* having, in the execution of a duty imposed upon them by Act of Parliament, received the proceeds of certain goods, a question arose between *Bazett & Co.* and *Campion*, which appears to be whether *Bazett & Co.*, who were the consignees of the goods, were entitled to receive the proceeds, or whether *Campion* was not, by virtue of a charter-party, entitled to a *lien* upon the proceeds to satisfy the amount due for freight? It appears that part of the proceeds of the goods had been paid to *Campion*, and that the other part, being a sum of 2,000 *l.*, had been paid to *Bazett & Co.*, whether with the consent of *Campion* or without it depends upon proof of the allegation in the bill, by which it is alleged to have been paid with his consent; and there is an answer of *Campion*, not disputing the fact of its having been paid, but disputing the statement in the bill of its having been paid with his consent. But that there was a sum of 2,000 *l.*, part of the proceeds of the goods, which did not

statement it will appear that all the acts of the sheriff were completed before he had any notice of the bankruptcy, and before the commission was sued out. It further appears that the exemption of the sheriff *before notice*, was distinctly brought before the Court, upon the plea that he acted only in pursuance of his duty: and, on the other side, the immateriality of notice was pressed; and it was even urged that the observations of Lord Mansfield were entitled to less weight on this particular point, because there was no statement in the case of any notice to the sheriff *in fact*, but that the decision may well be sustained upon the other reasoning to be found in that judgment. It has been observed that those cases, which are supposed to be the foundation of the argument of the Plaintiff in Error, were not brought under the notice of the Court of Exchequer by Sir John Richardson, who was not in the habit of doing things imperfectly. But the protection of the sheriff under the writ was expressly urged by him, and all the cases alluded to were cited and commented upon by Lord Mansfield in *Cooper v. Chitty*, which was itself made the subject of most minute and laborious inquiry and comment in the Court of Exchequer: so that it seems to me impossible that they could have utterly neglected the alleged authorities upon which one principal position contended for before them was made to rest: and the more so, if (as *I believe*) time was taken to consider the deci-

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wholly irrelevant; and objected to this supposed *dictum* as not being found in the other reports of *Cooper v. Chitty*; and concluded that the sheriff, having taken goods not mentioned in the writ, but other goods of other persons, was guilty of a conversion, the point of property in the plaintiffs having been conceded early in the argument.

The Court discharged the rule, holding, upon the authority of *Cooper v. Chitty*, that the property must be considered as divested by the bankruptcy.

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make it over to the party who proves that he is entitled to it, but that he is unable to discover who is entitled to it, and therefore he calls upon the Court to exercise its jurisdiction to take from him that which he admits is not his own, to decide between the contending parties, and to ascertain to whom it ought to be transferred. The money accordingly was in this case paid into Court, and an injunction was granted to restrain the contending parties from proceeding at law against the *East India Company*. Litigation ensued, unfortunately for many years, between the two contending parties before they were able to settle to which of them the money was due. In the meantime, the *East India Company*, on the day specified in the order, paid the money in, and relieved themselves from the whole of the demand made upon them. If the principle was ever to be established—which this decree would go to establish—that a party from whom money is claimed by different persons, cannot relieve himself from the obligation by paying the money into Court in an interpleading suit, the result would be that a party so circumstanced would lose all benefit from an interpleading suit, and in such a case as this, it is obvious that the debtor had better pay both the claimants than apply to the Court for its protection, although it is not likely that another instance may occur in which the litigation will be such as to make the final amount to be paid more than double the original demand.

Now, whose fault is this? Is it the fault of the *East India Company* that the successful party has suffered by the delay which has arisen from this litigation? The *East India Company* is not the cause of it; they were ready to pay, the claimant proving that he was entitled to the matter in dispute. The

unnoticed simply because matters of constant occurrence and continued acquiescence pass without notice or observation, or, in the words of Mr. Justice Richardson, already referred to, "because the law had long been settled, and the case had frequently occurred at *nisi prius* of late years." The next was the case of *Lazarus v. Waithman*, in which the point was decided by the Common Pleas as it had been in the Exchequer. *Price v. Helyar* followed with the same result; and lastly, came the case of *Dillon v. Langley* (q). The report by no means gives an adequate account of the state of fixedness and settlement at which, in the opinion of the King's Bench, the point now under consideration had arrived. I happened to be counsel in the cause, and am not likely very soon to forget what happened; particularly when I learned so soon after what had occurred in the Court of Exchequer, in the very Michaelmas term following, as to the case of *Balme v. Hutton*. I am far from saying that I was prepared with an argument as ingenious as that contained in the elaborate judgment pronounced by Lord Lyndhurst in the Court of Exchequer; but this I must say, that I was prepared with all the authorities upon which reliance is therein placed. Lord Tenterden, however, having first stopped the counsel on the other side, plainly intimated to me that the season for discussion was past; and, accordingly, having barely noticed two of the authorities alluded to, and particularly the main stay of the plaintiff in error, *Bailey v. Bunning*, which then produced no effect in that quarter of Westminster Hall, though it produced so much in another within half a year, against me, I sat down unheard.

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(q) 2 Barn. & Adol. 131.

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is the difference between the interest of five per cent., to which he was entitled under the charter-party, and that interest which the sum paid into Court, and invested in the three per cents. will produce. The order of the 15th of *February* 1832 directed that the stock which had been purchased should be sold, and in case it should be insufficient to pay the amount found due, that the whole of the money arising from the sale, and the cash in the Bank should be paid to *Campion*; and then it directed that he should give security, it being then ascertained what would be the amount of his' ultimate demand, to refund the same in case the Court should thereafter so direct. And it was ordered that *Bazett & Co.* should give security to pay the sum of 1,154 *l.* 7 *s.* 4 *d.*, being the residue of the money by the decree ordered to be paid by them to *Campion*, together with the subsequent interest and costs, in case the decree should be affirmed, and the other Respondents should be ultimately ordered to pay the same or any part thereof. It was not ascertained at that time what would be exactly the amount of *Campion's* claim; he was to receive the money out of the Court, he giving security to refund. On the other hand, it having been ascertained that 1,154 *l.* would be due to him, *Bazett & Co.* were to give security to pay that sum on settling the account, together with the amount of interest and costs which might be found to be due to *Campion*. I use this only to show that, from the commencement of the cause down to the present time, the Court of Chancery has considered that the *East India Company* was entirely discharged from obligation by paying the money into Court under the order for the injunction; and the order of the 25th of *April* 1832 provided means by which *Campion*, in the event of his succeeding in establishing a claim

some emphasis and appearance of assumed superiority, the title of the *older* authorities has been studiously applied. I am not aware that a case is of necessity better for being old; nor, I admit, is it worse; but I make the admission with a material proviso, viz., that it has not been impugned by subsequent decisions; for, if so, it is. Else, what is meant by expressions (in courts of law not unknown) of decisions overruled, and cases no longer law, which compose a list which it would be most inconvenient to enumerate?

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The first of these old authorities is the case *Bailey v. Bunning*, (reported 1 Lev. 191, also in Siderfin and Keble), and, I may add, is the only case which purports to be in point which has been decided by any court. To what authority this case is entitled, from the state of the reports of it,—how far it is impugned by the *quære* in Siderfin, or its own intrinsic defects,—I will not waste your Lordships' time by inquiring. I can make no addition to the comments which have been made by my learned brothers, with whose opinions upon the main question I agree. I will therefore only say, that, if the fact of notice to the sheriff be not material, and moreover if (as I think) the case of *Cooper v. Chitty* may still be maintained as law, then, in my humble judgment, was this old case overruled very nearly three quarters of a century ago, and remained dormant until revived (your Lordships have to determine for what duration) by a decision of the Court of Exchequer in 1831. The second case, *Lechmere v. Thorogood* (r), is not in point. It only decides that trespass will not lie in such case; which leaves uncontroverted the question whether trover will lie or not, the distinction between them being not quite so

(r) 2 Mod. 236.

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Mr. *Campion* would be entitled to make use of it for the purpose of reimbursing him for the loss which he has sustained. The order of the Vice-Chancellor after the last trial, founded upon the final establishment of *Campion's* rights, directs an account to be taken ; following, I believe, the terms of the order of the Master of the Rolls, it directs an inquiry to be carried on for the purpose of ascertaining what is now due to *Campion*, and then it declares that he has a *lien* for the amount thereof on the sum of 2,000*l.* As far therefore as any declaration of right can establish the title of a party, this decree does establish *Campion's* title, because it declares that he has a *lien* upon that sum. Who then is in possession of that sum, upon which it is declared he has a *lien* ? All the proceedings admit that this sum of 2,000*l.*, upon which it is declared that he has a *lien*, is in the hands of *Bazett & Co.*, not in the hands of the *East India Company*. I apprehend, therefore, that although we have not had the advantage of hearing the case argued on the part of *Bazett & Co.*, that they are necessarily parties at your Lordships' bar ; and I apprehend that the order, so far as I have now stated it, declares as against *Bazett & Co.*, that Mr. *Campion* is the party having a *lien* upon the fund, admitted and proved to be in the hands of *Bazett & Co.* But the contest here is not between *Bazett & Co.* and *Campion*, but between *Campion* and the *East India Company*. And although the declaration of *lien* is included in the appeal, it does not appear at all necessary, for the purpose of relieving the *East India Company* from that part of the decree, which imposes so great a burthen upon them, to alter it. The other part of the decree which affects them is that which orders them to pay the 2,000*l.* into Court. If your Lordships are of opinion

commission notice, and from what time? The day it issues, or within a week, or at what time? I am aware of no authority which establishes that a commission is evidence of itself, and for itself, of the time at which it issues. This at least I know, that, in the case of *Lee v. Lopez* (*t*), where notice to the sheriff was considered material, the point to be ascertained, according to the language of the Court, was, not when the commission issued, as if importing notice of itself, but when the sheriff *had notice* of the commission. If, then, the fact of the commission having issued was to be brought home to the sheriff, like any other fact, upon the statement of the case *it is not*. If, then, there be no facts in the case to sustain the observations, what is the result? Why, that, in my opinion, the judgment may be sustained for *other* reasons which Lord Mansfield has given. In the report of the case in Blackstone, Lord Mansfield is made to say, “that, if the sheriff had sold *immediately* after the seizure, he would have been liable.” If he did say so, I think he would have said truly; but I find that it is generally considered to be an error in that report. But, how stands the report of the same case in Burrow? The concluding words of Lord Mansfield in his judgment in the case of *Cooper v. Chitty* have been quoted, and with great reliance:—“The seizure here is after the act of bankruptcy, and therefore after the property was vested in the assignees; but that was excusable, and the sheriff shall not be made liable by relation as a wrong-doer. The gist of this action is, the false return and sale long after the commission and assignment.” Passing by the diminished weight of these remarks, from the doubt suggested whether there be

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(*t*) 15 East, 230.

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any fact to sustain them, let us see what else has been said in an earlier part of his judgment in the same report. I find these words: "But the argument from these principles (cases are stated to have been commented upon, but the comments are not given) is this: Here the taking was *lawful*, and therefore the sheriff was bound to complete the execution by the sale. Answer: The premises are not true; and, if they were, the consequence would not follow." And then come these words, which, I must think, are hardly less material in a contrary direction. "The taking was not lawful, because then they were the goods of a *third* person." So, then, the taking was unlawful; and why? Because it was the taking of goods of a third person—that is, of a person not named in the writ. And, why is that unlawful? Because it is, when followed up by a sale, an unauthorized disposal of the goods of another—which is another name for a conversion. But, beyond all this, for what purpose is notice necessary, and in what respect material? Is the property more or less in the assignees, according as there has or has not been notice to the sheriff of all or any of the stages of the bankruptcy? Is it more or less the taking of *their* goods? And, accordingly, the learned and experienced counsel who argued this case at your Lordships' bar expressly rejected the fact of notice as wholly immaterial, and discussed the case as if the plaintiff in error had been fully affected by it.

If, then, the observations at the conclusion of Lord Mansfield's judgment, upon which so much reliance has been placed, may be rejected, and the case be sustained without them, then must the case of *Cooper v. Chitty* be added to the authorities in favour of the defendant in error. But, if the fact of notice may be

considered as existing in that case from a commission having been sued out, and moreover, that, in order to constitute conversion in the sheriff, notice to him is necessary, though its materiality is now abandoned, still I agree with those of my learned brothers who are of opinion that the case I am observing upon must be considered to be in favour of the defendant in error. The late Mr. Justice Taunton thus expressed himself in *Balme v. Hutton*: "I am pretty clear that an opinion grew up that the sheriff was equally answerable in both cases (*i. e.* with or without notice); that, from the act of bankruptcy, the property vests in the assignees; and that any sale or disposition of it afterwards without their privity must be a wrongful conversion, by whomsoever made." I will only add, that this is precisely the view presented to the Court of Exchequer on behalf of the plaintiff, in the case of *Potter v. Starkie*. The case of *Smith v. Milles* (*u*) proceeds entirely upon the distinction taken between trespass and trover, and reference is made in the considered judgment there pronounced to the cases of *Lechmere v. Thorogood*, *Bailey v. Bunning*, and particularly to that part of Lord Mansfield's judgment in *Cooper v. Chitty*, wherein he speaks of men being excused from being punishable by indictment or action as trespassers. Mr. Justice Ashhurst then adds: "The plaintiffs are not injured, as it is competent to them to recover the value of the goods by bringing the proper action of trover; but the officer shall not be harassed by this species of action, in which the jury *might* give vindictive damages." It must be admitted, however, that if notice be material, this case is not any authority for the present, inasmuch as the fact of notice did exist in it.

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(u) 1 T. Rep. 475.

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subjected, in coming here to have the order altered in their favour. How then will your Lordships deal with these costs? The question is, whether there are not the means of giving those costs against *Bazett & Co.* They are not, in point of fact, before the House, but it is only by their own default that they are not so; they might be here, but they do not choose to appear. It is a question, whether it is not possible so to frame this order as to prevent the costs of this appeal falling on Mr. *Campion*, upon whom or upon the *East India Company* they must necessarily fall in the first instance. As to the Appellants who have prevailed in this appeal, it is quite clear the costs cannot be given against them, and it is equally clear that Mr. *Campion* ought not to be subjected to them.

The order appealed from, varied with a declaration to the Court below, to omit so much of said order as directed the Appellants to pay the 2,000 l. into Court.

The *Solicitor-General* asked for costs of the hearing before the Vice-Chancellor. The *East India Company* was not a party to any proceeding from the time of the injunction. *Campion* got the fund; he ought to pay the costs, and get them from *Bazett & Co.*

The *Lord Chancellor*:—Yes: we leave it to the successful party below to get them from the other party.

It is *ordered* and *adjudged* by the Lords, &c., that so much of the decree or decretal order complained of as directs that the Appellants do pay into the Bank with the privy of the Accountant-General of the Court of Chancery, &c., the sum of 2,000l., be, and the same is hereby reversed. And it is further *ordered* and *adjudged*, that in all other respects the said decree or decretal order be, and the same is hereby affirmed. And it is further *ordered*, that the Respondent *John Campion* do pay to the Appellants the costs of their appearance at the said hearing on further directions.

the assignees all the property that the bankrupt had at the time of what I may call the *crime* committed (for the old statutes consider him as a criminal), and make the sale by the commissioners good against all persons who claim by, from, or under the bankrupt after the act of bankruptcy, and against *all executions* not served and executed before the act of bankruptcy. Dispositions by process of law are put on the same foot with dispositions by the party." The prevailing object was, to prevent and avoid those partial and therefore unjust dispositions of the remnant of their fortunes which men in desperate circumstances (as we learn from the statutes) had been in the habit of making, and which we know men in such a situation are likely to make. Hence the relation to which I am alluding. The case of *Cary v. Crisp* (*x*), cited at the bar for the purpose of showing, that, till assignment, the property remains in the bankrupt, may well be admitted; for, it is in no respect inconsistent. The question is, whose the property is *after* the assignment, and from what date; and upon that question, as no doubt exists, so none was attempted to be raised. The point was admitted. Consequently, as to the first requisite for maintaining the action of trover, I mean property in the goods, the case of the defendant in error is abundantly established.

Next, as to the second requisite for supporting this action—a conversion. Suppose it had been the case of a stranger—an indifferent person—the point, I apprehend, would have been clear: and why? Because it would have been an unauthorized intermeddling with, or, (in the language of the Court in the case of *Jenkins v. Smith* (*y*), when defining a conversion,) "the taking upon him to dispose of the pro-

(*x*) 1 Salk. 118.

(*y*) 1 Wils. 328.

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perty of another," which is there declared to be "the tortious act, the gist of this action." The question therefore comes to this—whether the case of the sheriff be excepted from, or, rather, not included in, the operation of the statutes, or, if not, whether he be protected by the peculiarity of his situation and character? That he is not expressly excepted, is clear and has nowhere been pretended. To hold that he is so, virtually or constructively, is more than I am prepared to do. And herein I beg leave to say, that I do most perfectly agree with the observations of more than one of my learned brothers as to our duty in construing and interpreting Acts of Parliament. I take it to be this:—Where the words of the Act are general and comprehensive, and the object clear, nothing short of gross and manifest inconsistency with that object, or plain and palpable injustice which must inevitably ensue from such a construction, can authorize courts of law in giving a more confined and limited meaning to such general expressions than they ordinarily and naturally import and bear. What else is restraining by inference or varying by interpretation, but, to a certain extent, recasting and remodelling the statute, or, in other words, invading the province of the Legislature itself? What right have we to assume, that, if the object in this case was (as it was undoubtedly), for the sake of preventing those frauds which have been before alluded to, to cut matters short at and from the act of bankruptcy some inconveniences and hardships consequent upon the general object and prevalent design were not foreseen and known, but neglected for the sake of what was considered to be the greater good—the protection of the body of creditors? Supposing the sheriff to be, not excepted from, but included in the

operation of the statute of Elizabeth, and that there may be some degree of hardship (if, in truth, that can be used as any argument at all) in such interpretation, all that can be said is, that he shares the same fate with others equally entitled to consideration, or, if the phrase be allowable, compulsive *bonâ fide* payments were to be refunded; harmless and honest dealings were avoided. Against which inconveniences the Legislature, as your Lordships are aware, have very properly and consistently granted relief. But an attempt by the courts of law to do the same, would have been equally inconsistent and improper. In that relief, however, the sheriff is not included. Is he, then, within the words of the statute of Elizabeth, "A person claiming by, from, or under the offender?" It has been contended that he is not: and if by that it be meant to assert that he claims nothing for his own individual use and benefit, the observation is certainly not without truth; but it falls short of the purpose for which it is made. The creditor who sets the sheriff in motion clearly claims "from" the bankrupt: the vendee to whom the sheriff transfers the goods, claims "from or under" the bankrupt, or he gets nothing. Can I, then, say that the sheriff, who is so mixed up with the concerns of the bankrupt, in effectuating the claims of one against him, and transferring the title to another from him, is to be considered, with reference to the statute, as if he stood totally aloof from the transaction; and that, too, when, for the purposes of this action, and in order to constitute conversion in point of law, it is not necessary that any claim should be made for the party's own emolument? This was the very point decided in the case of *Jenkins v. Smith* (z), the special verdict therein

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There was a minister of police, and there was a prefect of police in Paris, and the King was in the exercise of civil authority there, but that authority did not extend over the armies of occupation; the courts of law were sitting; the treaty of peace was not at that time signed. Paris and the whole country were in the military occupation of the allies; the country was governed by the convention of the 10th of July. The meaning of the word "lines" must depend on circumstances; generally speaking, wherever posts extend, the lines extend; in other cases, only so far as they could be under control; but in this case I should say, that the lines extended as far as the posts; in fact, as far as the lines of the allied army. The Russian troops formed part of the lines of the British army. There was a Prussian commandant of Paris appointed by me; the general officer commanding the division of which Lord Waldegrave's regiment formed part, must have given Lord Waldegrave authority to reside in the street. I do not recollect hearing of the marriage before it took place. An offence committed at that time by a soldier in the Rue St. Honoré would have been subject to the decision of a court-martial. I was in the habit of making over men to be tried by the laws of the country, but that depended on my discretion. I did it in Spain.

Re-examined:—At the time of this marriage there was a large French army in arms behind the Loire.

Sir *George Murray*:—Was quartermaster-general of the army at the time referred to; he was of opinion that Lord Waldegrave's house was beyond all question within the limits of the lines of the British army.

Lady *Waldegrave* stated, that she was married in October 1815 to the late Earl of Waldegrave, at Paris,

and that the claimant was born in Grosvenor-place, London, February 6, 1816.

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Dr. *Lushington* (with whom was Mr. *Austin*), on the part of Capt. *Waldegrave*, the brother of the late Earl:—After this evidence, it cannot be denied that the form of a ceremony of marriage was gone through within the British lines upon the 3d of October 1815, but this ceremony did not constitute a valid marriage. In the first place, it was not a marriage according to the laws of France. It was not a marriage valid at common law; nor did it constitute a valid marriage within the protecting provisions of the statute 4 George 4, c. 91. The object of that statute is to impose regulations on acts done by persons not within the realm of England, and which acts are to give a *status* to the persons, whatever may be the *lex loci* of the marriage. If that act does not apply, the *lex loci* must prevail; and then it must be conceded that this was not a valid marriage. Why is it that certain marriages not celebrated according to the *lex loci* are treated as valid? First in respect of the comity of nations, and next on account of the necessity of the case.

As to the first. The comity of nations permits the chapels of ambassadors, or, in some particular cases, of British factories, to be for such a purpose excepted from the laws of the country to which the embassy is sent, or where the factories exist, these exceptions being duly recognized by our own laws. But to make a marriage good at the chapel of the British embassy, or of a British factory, it must be celebrated in such a manner as would make it valid at that moment in England. That was clearly not the case in the present instance. Then does the se-

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cond cause of exception apply—the necessity of the case? The right to celebrate marriages within the lines of the British army was only granted on account of the necessity of the case. Now that necessity can only exist where the army is in a hostile country. But that was not the case with this marriage, and it is this circumstance which distinguishes the present case from that of *The King v. Brampton* (b). France was not, in October 1815, in the situation of a hostile country, for the king on the throne was our ally—an English ambassador was in Paris duly accredited to him—the government of the country was administered in the regular manner, the police was duly organized and in action, and the ordinary tribunals were holding their sittings. The laws of the country were, therefore, in full operation, and the marriage, not being celebrated at one of the places recognized as exceptions to the ordinary rule, ought to have been celebrated according to the directions of those laws. The evidence shows that there was no such necessity existing in the present case as to justify the departure from the ordinary practice. The statute clearly intended to protect only such marriages as were made within the lines from the necessity of the case, and this is not a case of that description. But further, it is clear from the words of the statute, that no marriage celebrated within the lines of a British army can be valid, except it is celebrated under the authority of the commanding officer of the man. No such authority was given here by the commanding officer of the late Earl. If therefore a marriage properly celebrated within the lines of the army when not in a hostile country would be valid according to the provisions of the Act, still this is not

(b) 10 East, 282.

perty whithersoever it goes, and must have a right of action against any person who converts it; otherwise it is impossible that they can make due distribution among the creditors. In this case, at a period when the fact of the bankruptcy was not known (although it had taken place), the defendant, the sheriff, who was commanded to take the goods of Leonard, the bankrupt, took goods which *had* belonged to Leonard, but which had then ceased to belong to him, and were (as it was afterwards ascertained) the goods of his assignee; and he converted them. The Defendant contends that he is not liable to this action of trover, because he is a public officer; that he was called upon to execute the process of the law; and that at the time he executed it, he had no reason to doubt that the goods which he found in the possession of Leonard were his property. I admit the hardship, and regret that it exists. But the Legislature has not made any exception in favour of a public officer under these circumstances; and I think that a court of law cannot supply that omission. This is the best opinion that I can form upon the Act of Parliament itself. And this would be my judgment were the case *res integra*.

The next question is, whether this Act of Parliament has in all times received a contrary exposition. If an Act of Parliament more than two centuries old has received one uniform construction, it would perhaps be more safe to yield to that construction (even though it should not be quite satisfactory), than, by making a change, to unsettle the opinions and the practice of the profession and of the public. But I do not find the stream of authority so uniform as to compel me to adopt a construction of this statute at variance with my own conviction. On the contrary,

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The *Lord Chancellor* :—I stated yesterday that I had no doubt as to the facts of this case, which were proved sufficiently to show that the parties had in fact complied with the provisions of the statute. But a question still remained as to the construction required by one part of the section of the statute, and as to the necessity of something further being done before the marriage was allowed to take place. His Lordship here read the provisions of the 4 Geo. 4, c. 91. It was contended at the bar, that in order to bring the marriage within the provisions of this statute, it was not only necessary that the marriage should be celebrated by a British chaplain, but that there should be the authority of the commanding officer for its celebration. I was not much struck with the force of the argument, but as it was the first time that the point had been raised, and as it was one of considerable importance, I thought it necessary to postpone giving the final judgment upon it for one day. On reconsidering the subject, I am clearly of opinion that such authority was not necessary, and that the marriage was valid.

Lord *Brougham* :—I fully concur. I have no doubt whatever on the construction of the statute. I think that this was a valid marriage within the lines.

The Committee for Privileges reported accordingly, and the writ was issued.

which had before existed: and the Court decided that the sheriff would not be liable to an action of *trespass*, but that he was liable to an action of *trover*, where the act of bankruptcy over-reached the execution. The case is further valuable for this reason—that the preceding cases of *Bailey v. Bunning*, *Lechmere v. Thorogood*, and *Cole v. Davies*, were brought under the consideration of the Court, and, so far as either of them can be considered as militating against the doctrine then laid down by the Court, they were over-ruled. I think that the reasoning of Lord Mansfield is sound and convincing—that he has made the true distinction between *trover* and *trespass*; and it is certain that that solemn decision received the universal assent of Westminster Hall. It appears from the declaration of Mr. Justice Burrough, in the case of *Lazarus v. Waithman*, that, when he entered into the profession, he found it settled and established law. That is confirmed by the case which occurred next after the case of *Cooper v. Chitty*, viz. *Hitchin v. Campbell* (z), in 1772. [The learned Judge, after stating the proceedings in that case from the reports of it, and after examining the cases that followed it in order of time, viz., *Smith v. Milles* (a), in 1786; *Cotter v. Starkie* (b), in 1807; *Wilson v. Milner* (c), in 1809, (at nisi prius); *Lazarus v. Waithman* (d); *Price v. Helyar* (e); and *Dillon v. Langley* (f), proceeded thus:]

The cases which I have cited have the authority of nearly twenty Judges who have sat in Westminster Hall who are not now living, and several who are now

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(z) 2 W. Black. 779. 827; 3 Wils. 304.

(a) 1 T. Rep. 475.

(b) Vide *supra*, p. 714.

(c) 2 Campb. 452.

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(d) 5 B. Moore, 312.

(e) 4 Bingh. 597; 1 Moore & P. 541.

(f) 2 Barn. & Adol. 121.

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duced letters purporting to be written to him by *J. F.*, and which, if genuine, would support his answer, but they were charged to be fabricated for the purpose, and no explanation was given respecting them. The Master found all the said advances in goods and money, except the 20,000 *l.* to be gifts. HELD, by the Lords, affirming a decree allowing exceptions to that report, that *G. M.* was debtor to the intestate's estate for all the said sums, and the price of the goods.

MR. *JOHN FARQUHAR*, lately deceased, was born near *Aberdeen*, went to *India* about the year 1770, and remained there till 1814, when he returned to *England*, having, during his residence in *India*, acquired property of the value of about 700,000*l.* He was never married. His nearest relations, when he arrived in *England*, were *James Mortimer*, and *George Mortimer* (since deceased), *Charlotte*, the wife of *William Aithen*, who resided in *Scotland*, and *Mary*, the wife of *James Lumsden*, who also resided in *Scotland*, being the children of a deceased sister; *Elizabeth Willoughby*, the wife of *Peter Trezevant*, who resided in *North America*, the child of a deceased brother; and *John Farquhar Fraser* and *Dame Charlotte*, the wife of *Sir William Templer Pole*, Bart., the children of another deceased sister. Mr. *Farquhar* died on the 6th of *July* 1826, leaving his said seven relations surviving him, and on the 15th of *December* following the said *J. F. Fraser* obtained letters of administration of his estate to be granted to him alone, which were confirmed to him in *June* 1829, after a suit for obtaining probate of an alleged will had been dismissed in the ecclesiastical courts, and Mr. *Farquhar's* intestacy established.

In the latter end of the month of *December* 1826 Mr. *Peter Trezevant* and *Elizabeth Willoughby*, his wife, arrived from *America* in this country. On the 10th of *July* 1829 they, together with the trustees of their marriage settlement, filed their bill in Chancery against the said *J. F. Fraser, J.* and *G. Mortimer, Sir W. T. Pole* and his wife, *J. Lumsden* and his wife, and *W. Aitken* and his wife, thereby stating, amongst other things, that Mr. *Farquhar* was, at the time of his decease, seised to him and his heirs of very considerable freehold and copyhold estates, which he had contracted to sell, and that he was possessed of very considerable personal estate, and that he died intestate, leaving the plaintiff, *Elizabeth Willoughby Trezevant*, his heir at law and customary heir, and also leaving her, together with the other six above named relations, his only next of kin him surviving; and also stating a settlement, whereby trustees were appointed for the plaintiffs of one-seventh share of the personal estate and effects of the said Mr. *Farquhar*, and of the monies to arise from the sale of his freehold and copyhold estates; and also stating that Mr. *J. F. Fraser*, by virtue of the letters of administration granted to him, had possessed himself of the personal estate of the said intestate. The bill prayed that an account might be taken of the personal estate and effects of the said intestate come to the hands of Mr. *Fraser*, and that an account might also be taken of the debts and funeral expenses of the intestate; and that his personal estate might be applied in a due course of administration, and that the clear residue thereof might be ascertained, and that one-seventh part of such residue might be paid by Mr. *Fraser* to the trustees of the said settlement upon the trusts thereof.

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The several defendants to the bill put in their answers. Part 2 of Schedule A. to the answer of Mr. *Fraser*, entitled, "Containing an account of all such parts of the personal estate and effects of the intestate as are still remaining outstanding," contained the following, among other items :

£. s. d.

Amount due from *G. Mortimer*, one of the next of kin, for money lent to him by the deceased in *October* 1821, 10,000 - -
 Ditto, from ditto, ditto, *April* 1826 - 20,000 - -
 Against which this defendant has retained the sum of 21,337 *l.* 15 *s.* 5 *d.*, the amount of what was distributed in stock amongst the other next of kin.

The value of a quantity of indigo delivered to *G. Mortimer* by *Bazett, Farquhar, & Co.*, and charged to the account of the intestate - - - 2,373 13 5

The value of wool delivered to *G. Mortimer* by *John Benett, Esq.*, to be accounted for by *G. Mortimer* to the intestate.

The value of linen, china, curiosities, and furniture belonging to the intestate, and a marble statue of the late Mr. Beckford, in the possession of the said *G. Mortimer*.

The cause was heard before the *Master of the Rolls* on the 30th of *March* 1830, when he decreed an account of the personal estate of the intestate, come to the hands of Mr. *Fraser*, the administrator ; and an account of the intestate's debts, &c. with the usual

directions in such cases; and the decree also directed the Master to take an account of the personal estate and effects of the intestate then outstanding, and to inquire whether it would be for the interest of the parties beneficially interested that any proceedings should be commenced for the purpose of getting in the property outstanding, and whether any of the contracts of the intestate for sale of his real estates were then subsisting, and capable of being or ought to be carried into effect, &c.; and also to inquire who were the next of kin of the intestate living at his death, &c.

In *December* 1830, Mr. and Mrs. *Trezevant* and their trustees carried in before the Master a state of facts and charge to the following effect: That the defendant, *G. Mortimer*, carried on the business of a wool-broker and merchant in London, and having represented to the intestate that he should derive greater benefit from his business if he was enabled to pay ready money for his purchases, prevailed on the intestate to give him an authority, addressed to intestate's bankers, for the advance of sums of money for the purpose aforesaid, as follows: "To Messrs. *Barnetts, Hoare & Co. London*, 2nd of *October* 1821: Gentlemen, I request you will please to advance Mr. *George Mortimer* such sums of money as you may think prudent, with the opinion of Mr. *David Colvin*, for the purpose of assisting him to pay in ready money the wool with which he manufactures his cloth. I am, gentlemen, your most obedient servant, *John Farquhar*." That at the same time defendant undertook to pay the intestate 5 *l. per cent per annum* upon each of such advances; that in pursuance of the said authority the defendant drew various drafts on the said bankers, and amongst the rest he drew one on the 15th *October* 1821 for 6,000 *l.*,

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and another on the 9th *November* 1821 for 4,000 *l.*; that none of these drafts were ever repaid to the intestate in his lifetime, or to the administrator since his decease, but the same and all interest thereon remained due from the defendant to the estate of the intestate; that in *October* 1822 the intestate contracted with *William Beckford*, of *Fonthill Abbey*, esq. for the purchase of large real estates at *Fonthill*, and other places adjoining *Wiltshire*, together with household furniture, plate, china, books, pictures, curiosities and other personal property and effects in *Fonthill Abbey*, and was induced by the said defendant to build a factory on part of the said estate, under the superintendence and direction and for the use of the defendant, he undertaking to pay the intestate interest at the rate of 5 *l. per cent per annum* upon such sums as should be advanced; and in order to provide for the expenses of the said building, the intestate wrote and delivered to his said bankers the following order: "Messrs. *Barnetts, Hoare & Co.*: Gentlemen, please to honour such cheques as Mr. *George Mortimer* may draw for my use. I am, gentlemen, your most obedient servant, *J. Farquhar. Fonthill*, 28th August 1824." That in pursuance of this order, said defendant drew many cheques on the said bankers, exceeding altogether the sum of 20,000 *l.*, all of which were duly honoured by the said bankers out of the intestate's monies; that the intestate entered into an agreement, dated the 2d of *January* 1826, to sell to the said defendant certain freehold, copyhold and leasehold estates in and adjoining to *Fonthill* (part of the estates purchased by the intestate of Mr. *Beckford*), and including the said factory, with the timber thereon, at the price of 19,700 *l.*, and which estates the said defendant hath recently contracted to sell for 40,000 *l.*;

and although it was expressed in the said agreement that the intestate, in consideration of 1,700*l.* paid to him by the defendant on the 5th of *December* then last past in part payment of the said purchase-money, yet the plaintiffs charged that in fact the sum of 1,700*l.* was never paid by the defendant to the intestate, and the plaintiffs therefore charged, that the whole of the said 19,700*l.* was still remaining due from the defendant, together with interest thereon at the rate of 5*l. per cent. per annum*, from the 11th day of *October* 1826, except the sum of 675*l.* paid to the administrator by the said defendant on account of interest; that the intestate, on the 22d of *April* 1826, through *Bazett, Colvin & Co.*, with whom he was a partner, lent the defendant 20,000*l.*, and the same with interest was then due from the defendant; that *Mr. John Benett*, of *Pythouse, Wiltshire*, being indebted to the intestate in 7,000*l.* for rent of parts of the estate purchased by the intestate of *Mr. Beckford*, the defendant prevailed upon the intestate to allow *Mr. Benett* to supply him with wool for the purposes of his factory to the amount of his rent, to which the intestate and *Mr. Benett* consented, and *Mr. Benett* accordingly supplied the defendant with wool to a large amount, and the defendant undertook to account to the intestate for the same, and to pay him the value thereof with interest; that the intestate and his partners being, in the year 1825, possessed of a large quantity of indigo, the defendant induced the intestate to prevail on his said partners to consent to the same being delivered to the defendant to be used in his said factory, the defendant undertaking to pay the intestate the value thereof, with interest; and the said defendant accordingly received a large quantity of the said indigo from the intestate and his part-

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ing the sheriff from a similar liability? No provision to that effect is to be found in any of the statutes. there be any such exemption, it must arise implied from the nature of his office, and the circumstance under which he is called upon to act. Now, his office is one of some profit and of considerable risk, in the taking of bail, in the execution of writs, (independently of questions under the bankrupt laws), and in many other respects, to which he is exposed for the sake of the community by the common law and by legislative provisions. Instances of such risks are noticed in several of the judgments in the case of *Balme v. Hilton* (p), and in the present case of *Carlisle v. Garland* (q) to which I would beg to refer your Lordships rather than repeat them tediously. The circumstances under which the sheriff is called upon to act are often difficult in cases such as are referred to in the first question proposed by your Lordships. He is commanded by the writ to seize the goods of A., and he seizes goods in the possession of A., supposing them to be his property, and having no reason to doubt it. It turns out that A. had only a defeasible property in the goods, and that, by reason of subsequent events, they were by relation the goods of other persons from time antecedent to the seizure: so that the sheriff, without any fault on his part, has not obeyed the writ; yet, if he had refused to seize the goods, and no commission had subsequently issued, he would have been answerable in another way—to the execution creditor, for such refusal. This appears to be very hard, but I cannot admit that hardship is in the case in itself a sound ground for a legal decision; the utmost effect it can possibly have, as it seems to me,

(p) 1 Crompt. & Mees. 272.

(q) 2 Crompt. & Mees. 31.

the sums of money, therein stated to have been advanced by the intestate to him, were advanced as loans at interest; on the contrary, he stated, that the same were absolute gifts to him, and were always so considered by the intestate, as well as all the other property and effects, consisting of the wool and sheep, the indigo and the household furniture and effects; and he further stated, that the intestate had always treated him in every respect as a parent, and as such always expressed himself most anxious to further his prospects in life, and to provide for him and his family; and he by the said answer admitted that the sum of 18,000 *l.*, the remainder of the purchase-money for part of the *Fonthill* estates purchased by him, together with interest thereon, and the sum of 37 *l.* rent, received by him on account of the intestate, and the sum of 45 *l.*, for a small quantity of furniture taken by him at a valuation, were then still due and owing from him to the estate of the intestate.

As evidence to show that the sums of 20,000 *l.* and the sums of 6,000 *l.* and 4,000 *l.*, received by Mr. *Mortimer* from the intestate at different times, were absolute gifts and not loans, he exhibited in his examination the following letter:—“*Church House, 30 April 1826: DEAR GEORGE,---To relieve your anxiety about matters concerning money, I tell you that all sums of money you have ever received from me are gifts and not loans; this I think ought to satisfy your lady, and convince her that I am doing a great deal for the benefit of your family, as I have always told her. I remain yours truly, J. Farquhar.*”—This letter was stated to have been written in consequence of some anxiety which Mr. *Mortimer* told the intestate was felt by himself and his wife, to have some memorandum in writing from him, that the sums

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struction of the statutes, independent of the authorities upon this particular question. The authorities have been cited and commented upon so fully in the cases of *Balme v. Hutton* and *Carlisle v. Garland*, that I do not feel myself justified in occupying your Lordships' time by again going through them. I admit that the case of *Cooper v. Chitty* is not a direct authority upon the point. But, since that case, there are many authorities which I need not cite, directly in point, that the sheriff is liable in *trover*, though not in *trespass*—a distinction for which I think I see good reason. But it is not necessary to discuss that point, since your Lordships' question is confined to the action of *trover*. Opposed to these are some other cases, *Cole v. Davies*, which is at best but a *nisi prius* case, loosely reported; *Bailey v. Bunning*, of which case, speaking with all deference, I must say, that the reports of it are so confused and contradictory, that I am really unable to discover what the Court ultimately did decide, or upon what ground they decided; *Lechmere v. Thorogood*, and *Lechmere v. Toplady* (t), decided only, first, that *trespass* would not lie, and secondly, that the judgment in an action of *trespass* was a bar to an action of *trover*; neither of which decisions are in point to the present question. I by no means agree that the modern decisions have proceeded, as has been supposed, on a mistaken notion with regard to the case of *Cooper v. Chitty*; for I find that, in many of them the older cases, and that of *Bailey v. Bunning* in particular, were cited. The preponderance, therefore, of authority as to decided cases is greatly in favour of the liability of the sheriff, and the established practice was such that

(t) 1 Show. 12; Comb. 123.

fixtures then remaining ; and also any timber on the estate that he might think necessary to complete and furnish the new house built by him as a free and absolute gift, and as his authority for so doing, the intestate delivered to him the following letter :—" *Mr. George Mortimer* : DEAR SIR,—The plate, furniture and fixtures, or any of the materials or glass you may require from the Abbey to complete your new house, or any description of timber on the *Fonthill* estate, you are to take away before the property is valued. *J. Farquhar*." Under the authority of this letter, the examinant did take possession of a small part of the said furniture, plate, &c., as a free gift from the intestate.

The plaintiffs carried in before the Master an amended state of facts in *August* 1831, and they thereby charged that the above stated three letters exhibited by *Mr. G. Mortimer* in his answer to their interrogatories, were false and fabricated documents ; and they insisted that the price of the wool and sheep bought of *Mr. Benett*, amounting together to 6,204 *l.* 8 *s.* 11 *d.*, and the price of the indigo at 2,375 *l.* 13 *s.* 5 *d.*, and the 20,000 *l.* and the other sums advanced to *Mr. G. Mortimer*, were due from him to the estate of the intestate, with interest at the rate of 5 *l.* per cent. from his death (1826). And as evidence that the sum of 20,000 *l.* was so due, they produced the following written acknowledgment :—" *London*, 4th *December* 1826 : In *April* 1826, *Mr. G. Mortimer* received of the late *John Farquhar*, esq., 20,000 *l.*, which he considered as a gift ; on the contrary, the other next of kin of *Mr. Farquhar* allege the said sum was advanced only as a loan. To prevent any disputes hereafter upon that question, *Mr. Mortimer* consents to treat the same as a loan, pro-

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G. Mortimer for parts of the real estate of the intestate, together with interest thereon, from the 11th of *October* 1826, and also the two several sums of 45 *l.* and 37 *l.*, and that it did not appear to him that it was necessary to take any proceedings other than the proceedings in that suit, for the purpose of getting in the said sums.

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To this report exceptions were taken by the plaintiffs, Mr. and Mrs. *Trezevant*, and their trustees, and also by Mr. *Fraser*, on the ground that the Master should also have found to be due from *G. Mortimer's* estate to the estate of the intestate, the following sums, viz. 10,000 *l.*, composed of the two sums of 6,000 *l.* and 4,000 *l.* received by *G. Mortimer* in *October* 1821, upon his cheques drawn on *Barnetts, Hoare & Co.*, under the before-mentioned authority of the intestate; 2,375 *l.* 13 *s.* 5 *d.*, the price of the indigo before-mentioned; 6,254 *l.* 6 *s.* 11 *d.*, the price of the wool and sheep purchased by *G. Mortimer* of Mr. *J. Benett* in 1825, and paid for by a set-off of rent due from *Benett* to the intestate; 266 *l.* 1 *s.* 4 *d.*, the amount of a cheque drawn by *Benett* on one *Knight*, and 664 *l.* 11 *s.* 9 *d.* paid by *Benett* in respect of more rent, both sums amounting to 930 *l.* 13 *s.* 1 *d.* received by *G. Mortimer* as the agent of the intestate; the value of timber cut at *Fonthill* and of furniture left at the abbey, and the statue of Alderman *Beckford* before-mentioned, kept in the possession of *G. Mortimer*. The first, second, third, fourth, and fifth exceptions by the plaintiffs, applied respectively to the said sums of 10,000 *l.*, 6,254 *l.* 6 *s.* 11 *d.*, 266 *l.* 1 *s.* 4 *d.*, 664 *l.* 11 *s.* 9 *d.*, and 2,375 *l.* 13 *s.* 5 *d.* By the sixth and seventh of their exceptions, they insisted that the outstanding personal estate of the intestate consisted of the further sum of 1,000 *l.*, the value of the furni-

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from the intestate, and this claim of gifts rests, first, on the authority of the order addressed by Mr. *Farguhar* to Messrs. *Barnetts, Hoare & Co.* in *October 1821*. The first question is, whether evidence of gift is to be found in that document, which is in these words—(his Honor read it, as in p. 661, *supra*). Now the contents of that document entirely negative the idea of gift at that time; whether the advance of money thereby directed was afterwards converted into gift is another question, hereafter to be considered; but as to the question arising out of this document, whether this was originally a gift or loan, it is to be observed, there is no limit in amount to the license of advancing. As a gift, it would amount to the whole fortune of the giver, but he refers it entirely (supposing it to be a gift) to the discretion of Mr. *Colvin*, to what extent the gift should go. If the intestate meant loan, it is very natural to suppose that he should wish to restrain the advances to what the situation and circumstances of the party borrowing might render expedient, and therefore he referred it to an individual in whose discretion he could trust as to how far it would be safe to make the advances. It is impossible to hold that this document is evidence of gift and not of loan. But it is said that, at a subsequent period, other documents from the intestate confirmed *G. Mortimer's* representation that this was gift. A question having arisen between *G.* and *James Mortimer*, brothers and partners in business, an arbitrator was appointed to settle the accounts between them; and in order to ascertain whether the sums received by *George* under this authority were to be carried to his account individually, or to the common account, the intestate wrote a letter in these terms: “The money advanced by me to Mr. *George*

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be a loan ; for, if it was gift, he could not withdraw it. Mr. *Barnett*, of the house of *Barnetts, Hoare & Co.*, deposed that Mr. *Farquhar* gave *G. Mortimer* an unlimited power to draw on their house. The power was in these words: "Please to pay such cheques as Mr. *G. Mortimer* may draw for my use." It is not an uncommon thing for persons to trust others to draw money for their use, but such an authority does not operate as a gift to the person to whom it is given, and certainly it is no evidence that a sum drawn under another authority is a gift. Then next come the depositions of Mrs. *Mitchel*, that Mr. *Farquhar* said he had given large sums of money to *G. Mortimer*, but she does not mention the sums or time they were given, nor any other particular that could connect that conversation with the sums now in question. But Mr. *G. Mortimer* produced, in his examination, three documents, which are of an extraordinary description. One of them is dated *April 1826*, and is applicable to these sums. [His Honor read it, as in p. 665, *supra*.] It was admitted that the body of this document was not in the handwriting of Mr. *Farquhar*, and the contest on the evidence was, whether it received his signature ; but, assuming that it did, still the terms are not sufficiently distinct exactly to know whether the document is to be taken as evidence of the advance having been originally a gift, or originally a loan and afterwards made a gift by this instrument. A conclusive objection to this instrument is, that no account is given when, or by whom, or under what circumstances, it was written. It was in the possession of *G. Mortimer*, and it was not put forward till long after the question arose as to the sum of 20,000*l.*,

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ward in evidence before me to show that they have ever ceased to deserve that character of loans up to the time of the intestate's death.

The next subject of exception is the wool, amounting to 4,504 *l.*, and the sheep, at 750 *l.*, making together 5,254 *l.* On the 10th of *September*, Mr. *Benett*, renting a large portion of the *Fonthill* estate, of which the rent was very large, about 3,000 *l.* a year, and at that time owing a year's rent, and Mr. *Mortimer* being authorized by Mr. *Farquhar* to receive the rent, an agreement is made between him and Mr. *Benett*, by which the sum due for rent was to be satisfied by Mr. *Mortimer's* purchasing wool of Mr. *Benett*, and the money to become payable for the wool was to be set off against the amount of rent due. The agreement is set out amongst the exhibits.—“*Memorandum*, the 10th *September* 1825. It was agreed between *G. Mortimer* Esq. and *John Benett*, Esq., that the said *G. Mortimer* shall purchase all the said *John Benett's* wool, at the price of 2*s.* 4*d.* per pound, for that which is washed on the sheeps backs, &c., and that the said *John Benett* shall allow the said wool to be paid for by a deduction to the amount being made from his debt due on an acceptance, and to be become due in rent to *John Farquhar*, Esq., of *Fonthill Abbey*, with his consent, signified by his signature hereto.” —This agreement, signed by *G. Mortimer* and Mr. *Benett*, afterwards received the signature of Mr. *Farquhar*. It appears that the wool was delivered between the 21st and the 29th of that month of *September*; and on the 15th of *October* 1825, a further agreement was entered into, relative to the purchase of some sheep. The period at which this contract took place is of great importance.—“*Memorandum*, 15 *October* 1825: Mr. *Mortimer* agreed with Mr. *Benett* to buy

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to be paid on account of Mr. *Mortimer*, it, of course, required Mr. *Farquhar's* consent to set off the money so due from Mr. *Mortimer* against the rent so due from Mr. *Benett* to Mr. *Farquhar*. That becomes material when we see the way in which Mr. *Mortimer* claims it; he does not say that Mr. *Farquhar* gave him the rent, but he says that he made him a present of the wool and the sheep. Now it does not appear that Mr. *Farquhar* ever had anything to do with the wool and the sheep; they were purchased by Mr. *Mortimer* for his own use, and all that Mr. *Farquhar* had to do with them, was to permit the rent which he was entitled to receive, to go in payment of what Mr. *Mortimer* had to pay to Mr. *Benett* for the wool and the sheep. One of these three documents is produced for the purpose of establishing Mr. *Mortimer's* claim to this sum of money, whether it be called wool or sheep, or whether it be called rent. The document is dated *September* 20, 1825, it being in proof that the contract for the sheep was signed on the 15th of *October* and had no existence at an earlier period than the 7th *October*. The document runs thus:—" *September* 20, 1825. Dear George,—I agree to give you all the merino and sheep which Mr. *Benett*" (read the letter as set forth, p. 666, *supra*). Now it is impossible to look at his document and not to see that it never could have been written before it was signed; the name is not in a place in which any one would write it, and the letters are all crowded together for the purpose of being completed without running over the signature of Mr. *Farquhar*. All that is plain on the face of that document, without any information being given to explain how or under what circumstances it was prepared. Mr. *Mortimer* or those who represent him, having the document, and the means

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would be liable if an act of bankruptcy appeared have been committed before the *sale*, when I ought have said, before the *seizure*.

But, an exemption in favour of the sheriff him is contended for, not on account of any exemption be found in the statutes, which are altogether si with respect to him, but on account of the natur his office, by which he is compellable to execute writs entrusted to him. There is no doubt th sheriff may, without any fault of his own, at ti incur considerable hazard in the discharge of his d But it is the peculiar nature of his office which subj him to this risk. Though he may sometimes s from it, much practical advantage occurs to the pu from his responsibility. The execution of writs, cording to the ordinary course of practice, is undertaken by the high sheriff in person, nor by under-sheriff; it is conducted by subordinate offic in inferior situations of life; from whose cond unless guarded by strict responsibility, collusion reasonably be apprehended. Accordingly, the l sheriff takes security from the under-sheriff, who t security from the bailiffs. From the discharge of t duty considerable profits arise; and there is no c culty in finding persons willing to undertake the for the sake of the emolument. There can be l doubt, that, if the seizure of goods under a wri execution by the sheriff's officer after an act of ba ruptcy, were sufficient to excuse a sale by the sh before assignment, the property, which ought to equally divided among the creditors, would, in n berless cases, be collusively disposed of to fictitious favoured creditors, who, when sought for by assignees, would either have absconded or be fo insolvent.

to the other points. Mr. *Mortimer* claimed the price of the indigo as a gift to him from Mr. *Farquhar*, and he relied on the letter dated the 29th of *October*, written by Mr. *Farquhar* to Mr. *Bazett*, one of his partners, in which, speaking of Mr. *Mortimer*, the writer says, "He is a manufacturer of broad cloth, and will be much obliged to you for any information with respect to the future price of indigo; in the meantime pray give him any quantity on my account." Now this evidence is open to the same observations that I have made with regard to the authority for the advance of money by the intestate's bankers,—that nothing could be more improbable than that a person should give to another an authority to receive indigo to any amount. Men intending presents, however liberal they may be, wish to be masters themselves of the extent of their own liberality, and not refer it to others to decide to what extent the gifts are to go, however they might trust others as to how far it is safe to go by way of loan; but the difficulty, which I feel arises from the evidence of Mr. *Benett*, who in speaking of a transaction which, it is clear, does not refer to this indigo, but which raises a probability in my mind that Mr. *Farquhar* might intend to make Mr. *Mortimer* a present of some indigo, speaks to having seen some paper, signed by Mr. *Farquhar*, respecting some indigo, following a conversation which, he says, took place about the latter end of *September* 1825. That paper cannot be this letter, because the dates do not correspond, and he speaks of that paper as only having been signed by Mr. *Farquhar*, whereas this exhibit is said to be altogether in his handwriting. The fact is, that the indigo was bought and supplied, not from the stock in the house, for they had not any, but it appears that they authorized a broker

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improbable that Mr. *Farquhar* could intend to give the furniture as a present than the evidence of Mr. *Phillips*; though he does not speak to the particular furniture in question, he speaks to the mode in which Mr. *Farquhar* dealt with the furniture, and the profit which he determined to make out of it, which makes it extremely improbable that Mr. *Farquhar* could have intended to make a present of any part of it. Mr. *Coombes* speaks to the value of the furniture removed as being 1,000*l.* Mr. *Delves* also speaks to there being certain plate, which is a very important matter of consideration when we are inquiring whether there is evidence to show that this 1,000*l.* worth of furniture was a present to Mr. *Mortimer*. The plate which was removed was worth 279*l.*, and the plate was not claimed as a present, but it is accounted for. The evidence of Mr. *Studley*, who is examined for Mr. *Mortimer*, proves that the furniture was removed, and that it was said to be worth not more than 1,000*l.*, so that upon this part of the case I will take the value at 1,000*l.*, because the witnesses on both sides, *Coombes* and *Studley*, agree in fixing that as the value of the furniture removed. Now to prove that Mr. *Farquhar* intended to supply Mr. *Mortimer* with furniture and money to fit up his house and set up the factory, Mr. *Studley* is examined, and Mrs. *Foxwell* is called to speak to a conversation in which she heard Mr. *Farquhar* say that he wished Mr. *Mortimer* to repair the pavilion, and to take furniture for it from the abbey; that is the whole, with the exception of the evidence of the document to which I am about to refer, and on which the case for Mr. *Mortimer* stands. The plate is not claimed, and the evidence of these witnesses applies to the plate as well as to the furniture. Now we have the exhibit, from which it is con-

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very conclusive. Mr. *Benett's* evidence is, that he had agreed to purchase part of the estate; that the timber was to be valued to him; that a communication was made as to whether he would object to certain trees being cut down, and finding they were not ornamental trees, and that he was only to pay for those trees that remained, he did not object; that afterwards certain other trees were cut, and then this transaction took place. Mr. *Sewell* proves that Mr. *Mortimer* admitted he was to pay for the timber trees. Mr. *Benett's* is the most important evidence, for he proves that the cutting of the trees was after the date of his contract (the 27th of *December* 1825), and not knowing any difficulty between him and Mr. *Farquhar*, mentioned to him the fact of the trees being cut, which excited Mr. *Farquhar's* surprise and anger against Mr. *Mortimer*, who afterwards came to Mr. *Benett* and expressed his regret that he had mentioned the circumstance, and requested him to communicate to Mr. *Farquhar* that he (Mr. *Benett*) was not displeased at the cutting of the trees; and throughout the whole of that conversation Mr. *Mortimer* represented that the trees were cut by him without Mr. *Farquhar's* authority. It must be considered, therefore, that these trees were not given to Mr. *Mortimer*, and his estate must be held liable for the value of them to the estate of Mr. *Farquhar*, and also for the value of the statue of Alderman *Beckford*, which, it is agreed on all hands, was removed by him."

His Honor accordingly made an order, by which he held the first, second, fifth, and sixth exceptions taken by the plaintiffs, and the first, second, third, fourth, sixth, and seventh exceptions taken by Mr. *J. F. Fraser* to be good and sufficient, except so far as the

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first and second of Mr. *Fraser's* exceptions sought to charge interest on the sums therein mentioned, and except so far as his seventh exception stated the value of the household furniture, plate, linen, china and books therein mentioned to be beyond the sum of 1,000*l.*, and therefore his Honor ordered that the same be respectively allowed. And upon the plaintiffs' third and fourth exceptions, and Mr. *Fraser's* fifth exception, it was ordered that it should be referred back to the Master to inquire and state to the Court whether the two sums of 266*l.* 1*s.* 4*d.* and 664*l.* 11*s.* 9*d.* mentioned in the plaintiffs' third and fourth exceptions, making the sum of 930*l.* 13*s.* 1*d.*, mentioned in Mr. *Fraser's* fifth exception were ever paid to the said late defendant *G. Mortimer* or not. And his Honor held the plaintiffs' seventh exception and Mr. *Fraser's* ninth exception to be good and sufficient, and did therefore order that the same should stand and be allowed, but ordered that it should be referred back to the Master to inquire what was the value of the timber in the said exceptions mentioned. And his Honor held Mr. *Fraser's* eighth exception to be good and sufficient, and did therefore order that the same should also be allowed, but ordered that it should be referred back to the Master to inquire what was the value of the marble statue of the late Alderman *Beckford*, sold by the said late defendant *G. Mortimer*, as in the said exception mentioned. And it was ordered that the two sums of 10*l.* and 10*l.* deposited by the plaintiffs and by Mr. *Fraser* with the registrar, on filing their said exceptions, should be returned to them respectively, and that the costs of all parties, except of Mrs. *Mortimer* (the Appellant), of and consequent upon the said exceptions, should be costs in the cause.

Mrs. *Mortimer* appealed to this House against that order.

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Mr. *Knight* and Mr. *Koe* for the Appellant:—It must be admitted that the task of impeaching a decree of the noble and learned Lord will be one of difficulty. But on the whole case, it is submitted, that, instead of decreeing on the merits, his Lordship ought to have directed an issue, and that this House will ultimately give order for such a direction. In the judgment pronounced by the noble and learned Lord at the Rolls, he admitted the great difficulty of the case. The evidence was extremely complicated. The question, being a question of debt, might be decided in an action of *assumpsit*, in which the administrator would be plaintiff and Mr. *G. Mortimer*, or his representative, defendant. Why was Mrs. *Mortimer* deprived of the benefit of that mode of trial? Surely it was no ground for changing the jurisdiction that the debtor was one of the next of kin of the creditor. This view of the case was not at all adverted to in the Court below, nor was the objection of the Statute of Limitations urged there or before the Master. The Master found the letters, exhibited by Mr. *Mortimer* in his examination, to be genuine, and reported in favour of his claim of gifts, except as to the 20,000*l.*, which he found to be a debt due to the intestate's estate, because Mr. *Mortimer* had been induced to admit that sum to have been a loan. There was a suit pending in the Court of Chancery for setting aside the written agreement containing that admission, as having been obtained by fraud and misrepresentation. The noble and learned Lord, in his judgment in the Court below, deciding in principle against the Master's finding on almost all the points,



be dated before the transactions to which they related took place.]

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That was as to a part of one of the exhibits which related to the transaction about Mr. Benett's sheep; and there was no improbability or inconsistency in taking the price of sheep at Weyhill fair for the standard of value of sheep agreed to be sold before the fair was to be held.

It appeared by the evidence for the Appellant, that Mr. *Farquhar* had placed himself in the situation of a parent towards Mr. *G. Mortimer*, and intended to advance him and promote his interest. It was not proved that he ever applied to Mr. *Farquhar* for the loan of any money, or to sell him any goods, and no evidence has been produced to show that Mr. *Farquhar* intended the 10,000 *l.* in question as a loan, or intended to call on Mr. *Mortimer* to account for, or to pay for the goods that he received by the direction of Mr. *Farquhar*. The indigo was forced on him; he was actually forced to become a manufacturer and dyer, in a factory built for the purpose, certainly with bad taste, in view of *Fonthill Abbey*. Mr. *Mortimer* could not well object to the projects which a rich unmarried uncle intended for his benefit; he was certainly his favourite nephew; the testimony of several witnesses concurred to that effect. Looking to the relation between the parties, every one must presume that these favours were gifts and not loans. The evidence treated Mr. *Farquhar* as placing himself *in loco parentis* to Mr. *Mortimer*. Regard being had to the magnitude of Mr. *Farquhar's* fortune, and the affection that he had for Mr. *Mortimer*, the only one of his family that he was desirous of advancing in life, and to the fact, that he did not in his life-time in

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in all, and tends to produce uncertainty and confusion if we abandon established and recognised rules. But independently of all authority, I think that, upon a true construction of the bankrupt laws, on which the question altogether depends, the sheriff is responsible. I will state the reasons for that opinion as shortly as the nature of the case will permit: and I am afraid that I must of necessity travel over a part of the same ground which I have already done at greater length in the Court below (*h*).

To the second question proposed by your Lordships I answer, that, in the case supposed, the sheriff is in my opinion liable. I have some doubt whether a simple act of *seizing* the goods would make the sheriff liable in a case of this nature, where the seizure would not be a *trespass*. The case of *Bailey v. Bunning*, often referred to, was, I conceive, decided on that ground: but, if, after seizure, instead of abandoning the possession, the sheriff *permits* any others to take or dispose of the goods, I think that is an act of conversion of the goods, as much as if he had so dealt with them himself: and it is so, if he permits the plaintiff and defendant so to dispose of the goods that the sheriff would thereby be entitled to pound the debt in the same way as if he had himself sold and levied the debt. Such a disposition I understand to be one by which the plaintiff receives the goods themselves or is allowed by the sheriff, by himself or some other, to sell them in satisfaction of his debt.

The third question proposed by your Lordships only in the event of the first being answered in

(*h*) The learned Baron's judgment in the Court below having been reported at great length, it has been deemed unnecessary to repeat it here, especially as it is substantially the same as the opinions of Justices Coltman, Coleridge, and Williams, hereinbefore fully set

and Mr. *E. D. Daniel* appeared for the Respondent Mr. *J. F. Fraser* : but all the Respondents being held, after explanation, to be interested alike in supporting the order appealed from, Mr. *Pemberton* and Mr. *Wigram* only were heard for them.

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They submitted that there was conclusive evidence applicable to each of the transactions in question, that the moneys and property, which were the subject of contest between the parties, were advanced to *G. Mortimer* by the intestate, as loans, or came into his possession under circumstances which rendered him accountable, and his estate was, therefore, properly charged with them. The examination put in by Mr. *Mortimer*, and the case made by it, were wholly disproved by the evidence adduced by the Respondents. The operation of the Statute of Limitations as to any of these advances, was prevented by the litigation in the Ecclesiastical Court respecting the alleged will of Mr. *Farquhar*. A court of equity had a right to adjudicate on the evidence produced in a suit like this, being for the administration of an intestate's estate ; and if it entertained no doubt upon the facts, it would not direct an issue to a jury. *Nicol v. Vaughan* (c).

The three pretended letters stated in Mr. *Mortimer's* examination, and relied upon as evidence of gifts from the intestate, were proved by the evidence to be counterfeit documents. Two of them were obviously, upon inspection, forgeries or otherwise fabricated writings, and the third was falsified by *G. Mortimer's* own declaration upon oath, made when he was qualifying himself to be one of the intestate's administrators.

Mr. *Knight*, in reply, insisted that an order direct-

(c) 1 Clark and Finnelly, 49.

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circumstance, because the counsel for the Defendant in Error, when arguing the case at your Lordships bar, observed that Lord Lyndhurst, when delivering the judgment of the Court of Exchequer in the case *Balme v. Hutton* (in which I concurred, having at that time the honour of a seat in that court), remarked *pointedly* on the fact of the sheriff having no knowledge that an act of bankruptcy had in that case been committed. I have thought it material to notice this circumstance, not as being essential to the support of my opinion, because I conceive the sheriff's claim to be exempted from all responsibility does not depend upon the question whether he was ignorant or cognizant of the act of bankruptcy, but upon his imperious duty and obligation to execute the writ.

For the Plaintiff in Error, it has been argued, that the sheriff, being a public officer and servant of the law, and in that character *compelled* to do the duty complained of, cannot be deemed liable to this act notwithstanding the bankrupt laws vest by relation to the property of the bankrupt in his assignees from the moment of the bankruptcy; that, if there be no legislative enactment, the words of which are sufficiently large to include the sheriff, yet an *exception* would be *implied* (if not expressed) in his favour arising out of his official character and duty; that there are many judicial decisions of weight and authority which recognize and confirm this exception. For the Defendant in Error, it has been argued that the sheriff, not being *expressly excepted*, must be considered as falling within the ordinary meaning and plain grammatical construction of the Act of Parliament referred to, unless at variance with the intention of the Legislature, to be collected from the statutes themselves; that the construction conten-

for your Lordships to take, is to let the case stand over for a few days in order to give an opportunity of looking into the evidence.

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Lord *Brougham*, this day, after stating the proceedings that had been taken in the Court below and in the Master's office, said the state of facts and charge carried in, the interrogatories that were exhibited, Mr. *G. Mortimer's* examination upon them, and the Master's report and the exceptions allowed to it, raised the question which has been, almost alone, argued at your Lordships' bar, whether or not considerable sums of money and certain goods, principally a large quantity of indigo of considerable value, which had, under Mr. *Farquhar's* authority and direction, come into the possession of Mr. *G. Mortimer*, had been so put into his possession by way of loan only, or by way of gift, and whether therefore, Mr. *Mortimer*, to the amount of those sums and for the value of those goods, was or was not accountable to the estate of Mr. *Farquhar*, under the administration. Now, my Lords, both at the time when this case was argued and since, I have very carefully considered the evidence on both sides, upon which the proposition of each party was sought to be maintained; and I have come to the opinion, without any hesitation whatever, that the judgment of my noble and learned friend in the Court below, was well founded, and that Mr. *G. Mortimer*, and the Appellant, as representing him and his estate, was and is accountable to the estate of Mr. *Farquhar*, to the amount of those several sums of money, and the value of those goods stated in the exceptions to the Master's report.

I purposely abstain from entering into the evidence in this case, and from giving any opinion upon the

struction ; but my opinion is
it with the 1 Jac. 1, c. 15, s. .
pari materiâ, and passed for t
conveyances, made by a bank
sonal property, unless made
children (all parties being of
some valuable consideration
sioners power to dispose of
manner as if the bankrupt
possessed to his own use at
ruptcy ; and enacts that the
disposition of the commissio
available to all intents, com
in the law, “against the ba
cutors, administrators, and as
and persons as are subject to
all other persons *claiming* b
offender, or such said other pe
veyance shall be made by the
means or procurement.” If tl
Eliz., c. 7, s. 2, were obscure,
to me to reflect so clear a l
distinctly, that, by the term

WRIT OF ERROR

FROM THE COURT OF EXCHEQUER CHAMBER.

1837.

May 18, 19.
June 27.
July 15.GEORGE GARLAND, Esq. - - *Plaintiff in Error.*

THOMAS CARLISLE, Assignee of the Estate and Effects of GEORGE VALENTINE LEONARD, a Bankrupt - - - - -	}	<i>Defendant in Error.</i>
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A sheriff (before the passing of the 6 Geo. 4, c. 16) having no notice of a previous act of bankruptcy committed by a trader, seized his goods under a *fi. fa.*, but withdrew upon an arrangement entered into between the execution creditor and the trader, receiving however his poundage in the ordinary manner. A commission was afterwards issued on this act of bankruptcy. HELD by the Lords (Lord Denman *diss.*) that the assignees might maintain trover against the sheriff for the goods seized.

Bankrupt.
Sheriff.

Semble, that the receipt of poundage was evidence of a conversion by the sheriff.

THIS was a writ of error brought to reverse a judgment of the Court of Exchequer Chamber, of Michaelmas term, 1833. The action was in trover, brought in his Majesty's Court of Common Pleas, by the Defendant in Error, as assignee of the estate and effects of G. V. Leonard, a bankrupt, against the Plaintiff in Error, late sheriff of the county of Dorset. The cause was tried before Mr. Justice Littledale, at the summer assizes at Dorchester, in the year 1825, when a verdict was found for the then Plaintiff, the said Thomas Carlisle.

That verdict was set aside, and upon a new trial before the same learned Judge, the jury found the

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following facts (among others) b
“ That G. V. Leonard, at the tim
the act of bankruptcy and the issu
sion hereinafter mentioned, was
that there was then a good po
debt; that the said G. V. Leonar
of October, 1824, committed an
that on the 15th day of December
a writ of *feri facias* issued out of
Bench, tested the last day of Mi
ceding, returnable on Monday ne
of St. Hilary then next, and direc
Dorset, commanding him, that
chattels of the said G. V. Leonard
be levied as well a certain debt of
Payne had recovered against hi
King’s Bench, as also sixty-fiv
damages, as well by reason of th
debt, as for his costs and charge
was endorsed to levy 306*l.* 1*s.* 6
fees, &c.; that on the 16th day of
December the said writ was de
Parr, at that time under-sheriff to
was then sheriff of Dorset; that
notice of the act of bankruptcy; t
sheriff’s officer entered and seized
mained in possession until the 24t
tion creditor, by arrangement en
him and the bankrupt, with the a
took some of the goods in satisfact
other goods were set apart for sat
poundage, officer’s fees, &c. The
bankrupt, founded upon the act o
15th of October, issued against the
on the 8th of January 1825, un

on the 14th of the same month, declared a bankrupt. That on the 29th of the same month an assignment of the estate and effects of the said bankrupt was made by the commissioners under the said commission to the said plaintiff. That in the beginning of February 1825 a demand was made of some of the goods seized, but they were refused to be delivered up. But whether," &c.

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This special verdict was argued before the Court of Common Pleas in Hilary term, 1831, and the Court delivered judgment in favour of the Defendant in Error(*a*). On the 10th of August 1832, a writ of error to reverse this judgment was brought into the Exchequer Chamber, where the case was argued on the 17th of June 1833; and on the 26th of November in the same year that Court affirmed the judgment of the Court of Common Pleas(*b*).

The case was then brought by writ of error to this House. It was argued by Sir F. Pollock and Sir W. Follett for the Plaintiff in Error, and by Mr. Serjeant Taddy and Mr. Serjeant Bompas (with whom was Mr. Ball), for the Defendant in Error. The arguments took place in the presence of the Lord Chancellor, Lord Wynford, Lord Brougham, and Lord Denman, who were assisted by the Judges of the common law courts. As the case has already been fully reported, and as the points for argument and the authorities chiefly relied on are noticed in the subjoined opinions of the learned Judges, it has not been deemed necessary to report the arguments of counsel here.

At the close of the arguments, the following ques-

(*a*) 7 Bingh. 298; 5 Moore & P. 105.

(*b*) 3 Tyr. 705; 2 Crom. & Mee. 31; 4 Moore & Scott, 24.



1824, at which time the 5 Geo. 4, c. 98, had passed, but had not come into operation, except for the special purposes referred to in the 133d section. The decision of the matter in debate must therefore turn upon the previous statutes, especially that of 13 Eliz. c. 7, and on the course of decisions which have taken place in reference to those statutes. The first statute, the 34 & 35 Hen. 8, c. 4, authorises the disposition of the bankrupt's property for satisfaction of his creditors, and gives the same effect to the transfer as if it were a conveyance by the bankrupt himself. There is nothing in this Act showing any intention that its enactments should have a retrospective effect. The 13 Eliz., c. 7, after authorising the appointment of commissioners for managing and disposing of the bankrupt's estate, directs that every direction, order, bargain, sale, and other thing done by the persons so authorised, shall be good and effectual in the law against the said offender or offenders, debtor or debtors, &c., and against all other person or persons claiming by, from, or under such offender or offenders, debtor or debtors, by any act or acts had, made, or done after any such persons shall become bankrupt. The object of this statute was undoubtedly to give the commissioners, when appointed, a retroactive power, so as to enable them to avoid incumbrances and transfers of the bankrupt's property happening subsequent to the act of bankruptcy. To what extent, and as to what persons this power was intended to operate, is the main subject of the present inquiry. The 9th section of the 21st Jac. 1, c. 19, has not, as it seems to me, any very direct bearing on the present question. The lands of the bankrupt were at that time bound by a judgment from the day to which the judgment related; and when a *fi. fa.*

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largely and beneficially for the aid, help, and relief of the creditors. If such is the case with the execution creditor, what is to be said as to the sheriff? The ground on which his case was sought to be distinguished in argument from that of the execution creditor was this, that he claimed nothing but to execute the King's writ, and could not strictly be said to claim anything. This mode of treating the subject seems to savour a little of verbal refinement, and strikes the mind with an impression as if it were more specious than solid; for it occurs at once to ask, if the sheriff claim nothing in the goods, why does he intermeddle with them at all? It seems to me that he does claim a right in the goods; namely, a right to seize and sell them; and that right is derived out of the debtor's right to them. He may, then, without any impropriety of language, be considered as falling within the description of a person "claiming by, through, or under the debtor," if such appeared to be the intention of the Act of Parliament. But, if the general object and scope of the Act would be satisfied by putting a different construction upon the clause, I do not think it would be doing any great violence to the language of it, if we were to say that the Act was intended only to apply to persons who claimed an interest in the goods for their own benefit. The object of the Act of Parliament is, to promote an equal distribution of the assets amongst all the creditors. To effectuate this object, it is essential that an execution creditor who has laid hold, for his own use, of a portion of the fund, should be made to refund it. But the case of the sheriff is different. He does not keep the money in his hands. He is a mere instrument of transfer; and it is by no means necessary, in order to carry out the object of the bankrupt laws, that he should be

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transferred to the assignees, in all their entirety, as they existed at the time of the act of bankruptcy. On what principle does this exception rest? I am not able to find any satisfactory one, other than that which was contended for in argument at the bar, that what the law compels a man to do, it will if possible justify him in doing. This principle is so entirely consistent with reason and the plainest dictates of justice, that it ought not lightly to be departed from. It cannot, indeed, be contended that it is of force sufficient to control the distinct and positive enactments of a statute; but, where a statute admits of two constructions, it may furnish an argument of considerable weight for the adoption of the one in preference to the other. It is obvious that this argument, be its weight more or less, is directly applicable to the case of the sheriff. He is bound to obey the writ; he is liable to an attachment if he does not. In the construing of an Act of Parliament, some degree even of astuteness might be pardoned, in endeavouring to avoid such a scandal to the law as must result where a man has been compelled to do a certain act, and is afterwards punished for doing it; where he is compelled to pay, either in purse or in person, for having done an act which he had been compelled by a similar legal necessity to perform. If these considerations had induced the courts of law to adopt what I have called the more restricted construction of the clause in question, I should have thought them well warranted in doing so; and it seems to me, that in the early cases the courts leaned to that construction. But I am constrained to say, that, in my judgment, the great body and weight of authority is on the other side. I do not propose to go in detail through the whole of the cases; they have already on former occasions been

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c. 7, 1 Jac. c. 15, 21 Jac. 1, c. 19, 4 Anne, c. 6 Anne, c. 22, and 5 Geo. 2, c. 30, do not extend to the sheriff at all; and that the last statute, 6 Geo. c. 16, does not increase the liability of the sheriff. The statute of Hen. 8, says the sale by the commissioners shall be good and effectual against the bankrupts, their heirs and executors, as though the sale had been made by the bankrupt at his own free will and liberty. The 13 Eliz. c. 7, s. 2, says, the sale by the commissioners shall be good and effectual (after an enumeration of various descriptions of persons) against all other persons claiming by, from, or under the bankrupt, by any act had, made, or done after he shall become bankrupt. The other Acts 1 Jac. 1, 21 Jac. 1, 4 Anne, 5 Anne, and 5 Geo. 2, relate to the sale or assignment by the commissioners, all refer to the statute of Elizabeth; and no fresh powers are given to the commissioners, except that, by the statute of Anne and of 5 Geo. 2, the commissioners are allowed to assign to assignees, for the general benefit of the creditors who prove their debts. But I think that the words of the statute of Elizabeth are sufficient to bind the sheriff; for, though he does not claim any beneficial interest from the bankrupt, yet he claims to sell the bankrupt's property for the purpose of paying over the proceeds to the creditor of the bankrupt; and that I think quite sufficient, as far as the words of the Act go, to bring him within the operation of the statute; and the more so as he has a remuneration in the shape of poundage for his trouble and such his liability. The statute 6 Geo. c. 16, need not be considered, because the transactions which give rise to the questions now under consideration took place before the statute passed.

But it is said the law will make an implied e

man; and again, by the same Court, in the case of *Price v. Helyar* (*i*); and, in 1831, by the Court of King's Bench in *Dillon v. Langley* (*k*). Now, if it were admitted, which is open to some dispute, that the earlier decisions are at variance with the modern ones, the latter are so precise, and have now been considered for so many years as established law, that, even if less capable of being upheld upon the express words of the statute than I think they are, they ought not now to be overturned.

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The law is pre-eminently a sensitive and practical science. Where there is a real grievance, it never fails to show itself, and usually either works out a remedy for itself, or is remedied by the Legislature. However great the anomaly may be (theoretically considered) in holding the sheriff liable in the case under consideration, the practical inconvenience has never been found to be very serious. If the sheriff is called upon to pay over to the assignees money which he has already paid to the execution creditor, he may repay himself at the expense of the creditor; or if, before he has paid over the money, he has good reason to apprehend a bankruptcy, he may apply to the party suing out the writ for an indemnity, or to the Court for time to return the writ. How little of real practical grievance there is may be inferred from the well-known fact, that the office of undersheriff is in general request, and is looked upon as an office of emolument sufficient to countervail any risk it may bring with it. The practical evil, on the other hand, is of no small amount, when the courts of law depart on any but the most solid grounds from an established course of legal precedents. The importance of certainty with respect to the rules of law ought never to

(*i*) 4 Bing. 597; 1 M. & P. 541. (k) 2 B. & Adol. 131.

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How can this be acting in obedience to the King's writ?

As to the hardship upon the sheriff, the general policy of the bankrupt laws makes many things apparently hard. I think the hardship of a case ought not to govern a principle on which the law should rest. Society is so framed that many persons fill situations which appear to induce great hardships and, if it be of sufficient importance for the Legislature to interfere, they will do so. The relation to the act of bankruptcy is made part of the law in order to prevent fraudulent transfers of property being made after the act of bankruptcy and before the commission. In carrying that into effect, some inconveniences and hardships occur which might have been provided for, by some clauses in the great number of Acts that have passed to remedy other hardships; and more particularly when the old bankrupt law was remodelled and consolidated by the 6 Geo. 4, c. 16. But it was not so done, though it must have been very well known, from the variety of cases that have occurred, that it was at all events a question of doubt.

But then the Plaintiff in Error says, that, by the construction which has been put upon the general administration of the bankrupt law, public officers in the station of having to execute process, are protected in cases circumstanced like the present; and that, though for a great number of years back, there are a great many decided cases, and though the practice while these cases have been recognised has been against sheriffs; yet these cases are contrary to law; and that the earlier cases were decided differently; and that these earlier cases being the first that occurred after the bankrupt law was introduced, are to be regarded as the existing law, not to be overturned

thinking at no great length, for I do not propose to review the authorities upon the subject. Speaking in this House, it seems enough for me to say that the result of my examination of the cases is this. I do not find a balance of authority so preponderating as to be absolutely conclusive on my judgment either way. Putting, however, the authorities which are in accordance with my own opinion at the very lowest possible estimate, and speaking of them in a way in which even those who differ from them cannot but concur, for they are numerous, of great weight, entitled to high respect, and have been (which is most important) acquiesced in generally by the legal profession, and acted on for many years, still if I determine my own opinion independently of them, and upon principle alone, they will warrant me in the satisfactory feeling that I am not setting up that fallible opinion so formed against all the authority bearing on the case.

Considering this question as one that is to be answered on principle, I ask myself what are the principles to which I am to apply for an answer; and that raises the further point as to what is the nature of the question itself. If it be a question of common law, in the absence of direct authority, I must look to legal analogy: and considerations of moral right and wrong, of general expedience or inconvenience, may be properly allowed to enter largely into the argument. If it be a question of statute law, the inquiry becomes one of a much more restricted range: it is then simply a question of construction, and none of those general considerations to which I have alluded have any place, except so far as they serve to illustrate the meaning of the language which the Legislature has chosen to employ; and it is obvious, upon this principle, that, where the legal, ordinary, and grammati-

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the writ. This argument, I confess, seems to me rather fanciful than sound. When the sheriff is either insisting upon his right to take or to hold the goods or the proceeds, or justifying the act he has done in the seizure of them, I do not know any general term more appropriate to describe his situation than that which the statute uses; and if the right to take or to hold depends, as no doubt it does, on the title of the bankrupt, surely he claims under him, although not by descent, conveyance, or any mode of voluntary transmission. If the execution creditor, who sets the sheriff in motion, claims under the bankrupt, if the sheriff's vendee of the goods claims under the bankrupt—and it is not disputed that both do—can their case as to this be put upon any principle which will not include that of the sheriff? Do you not in fact destroy their respective titles, if you show that the goods were not the bankrupt's when seized?

But, secondly, it is said, that, at all events, the claim does not arise by virtue of any act done by the bankrupt. The answer is most obvious, that the statute says nothing of the act being done by the bankrupt; the words are—"any act or acts had, made, or done after any such person shall become bankrupt." Nor can I think that those other words ought to be imported into the statute; if they were, the objection now relied on would apply not merely to the sheriff but to the execution creditor, who yet is admitted to be within the clause. He does not claim necessarily under any act done by the bankrupt, any more than the sheriff. If these words, "by the bankrupt," are not to be imported into the statute, the difficulty does not arise; for, the issuing of the writ, the delivery to the sheriff, the seizure by him, are all acts done subsequently to the bankruptcy. This section of the Act of Parlia-

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[REDACTED]

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is liable in trover only, or in assumpsit, in which the value of the goods is sought to be recovered, and not in trespass. But no lawyer maintains in terms that the argument of hardship can be relied on, where the meaning of the statute is unambiguous. Those therefore, who contend that the sheriff is not responsible, shape the argument differently; they rely on the ministerial character of the sheriff—that he acts only in strict obedience to the orders of the court, whose officer he is, and whose judgment he executes and is bound to execute: reason and justice, and well-recognized legal principles, they say, require, that in so doing, he should be borne harmless; that the relation to the act of bankruptcy is but a fiction of law, and must not be allowed to work wrong; and therefore, that, however general the words of the statute are, they must be read with an implied exception as to him.

I state the argument very shortly, not from any wish to diminish its real strength, but because your Lordships are fully aware of all the particulars which are involved in the simple proposition that all that the sheriff does he does in the strict performance of his duty, and under orders. Still, as it seems to me, the substance of the case is merely hardship and unreasonableness, and that the only grounds of law advanced cannot be safely relied on.

First, is this doctrine of relation a mere fiction of law? The statute law in substance enacts that a trader owing a debt or debts of a certain amount, and committing an act of bankruptcy, holds thenceforward his goods by a defeasible title; and that, if a certain other event happens, his title shall be defeated from the date of such act of bankruptcy, and this as regards, not merely himself, but every one claiming interme-

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[REDACTED]

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I conceive, therefore, that this is not, in fact, any fiction of law; but, if it be, it is one enacted by the express words of the Act of Parliament, and therefore we cannot mould it as we might a fiction of the common law. I may here revert to the case I have just put, and suppose the Legislature to have enacted, that, *as against all persons*, the disseisee, after re-entry, should be deemed to have been in possession: in that case, could any sense of hardship or injustice warrant the expounders of the law from holding that he might not maintain trespass for the mesne profits against the disseisor's vendee?

But, lastly, can we read the statute with an implied exception in it in favour of the sheriff? I am aware of the lengths to which our predecessors in former times have thought themselves justified in going, when dealing with the concise language and general terms of ancient Acts of Parliament. I will not stop to inquire whether in all the instances that might be cited their course was to be justified, or, in precisely similar circumstances, their example to be followed; but, for one, I think the principle which limits my duty in regard of statutes of so late a date as those of Elizabeth to that of exposition so clear and paramount, that I shall never think myself justified in taking a case out of the operation of a statute which falls within its plain and unambiguous language. I beg to draw attention to the precise words in which I lay down this rule for my own guidance: it is one thing to imply as written in a statute all that is absolutely necessary to give the written words a sensible operation; it is another to exclude any case which the words in their ordinary legal and grammatical sense embrace. And this I may say in addition—that, upon those who call

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It has been objected, in the course of the argument, that the sheriff cannot be held to fall within the description of the persons mentioned in the statute Elizabeth, as he claims nothing "by, from, or under the bankrupt." It is true, indeed, that he claims nothing *for his own benefit*; but it is equally true that he has acted in aid and assistance of one who claims from or under the bankrupt, namely, the judgment creditor, who caused the writ to be issued under which the sheriff has seized the goods. And, indeed, if the sheriff is to be held a person not falling within the description, he would be equally without the reach of it, whether the execution of the writ took place before or after the issuing of the commission, in which latter case no one has ever doubted the sheriff's liability. And from the view which I take of the operation of these statutes I cannot look upon the relation to the act of bankruptcy as any fiction of law, but as a statutory relation declared in plain and unequivocal terms by the Legislature, and intended for wise and salutary purposes; for, without it, there would be so large an opening for fraud that the bankrupt law would soon be rendered a dead letter. It is attended, no doubt, in many cases, with great hardship: but the Legislature has from time to time made exceptions in favour of particular classes of cases, where it was thought the general convenience would not suffer by a partial relaxation of the rule—instances of which are, the case of payment of debts to the bankrupt before notice of an act of bankruptcy (1 Jac. 1, c. 15), the limitation of five years in the case of the sale of real property after a secret act of bankruptcy (21 Jac. 1, c. 19), the case of payments by the bankrupt to creditors for goods sold (19 Geo. 2, c. 32); and again, more largely, the ca

To this is to be added what Sir John Richardson observed in the case of *Lazarus v. Waithman* (*m*), "that the law on this question has long been settled, and has frequently occurred of late years at *Nisi Prius*." Having adverted generally to the decisions, I proceed at once to an examination of them. The first in order is the case of *Potter v. Starkie*, of which some notice is to be found in 4 M. & Sel. 260, and also in Mr. Selwyn's Treatise on the law of *Nisi Prius*, 8th edit. p. 1431. It has been frequently alluded to, and generally for the purpose of receiving a ready refutation, viz. that it purported to proceed on the authority of *Cooper v. Chitty* (*n*), whereas that authority, properly understood, is directly opposed to it. If the case of *Cooper v. Chitty* be founded on two principles—first, that the property, upon assignment, vests in the assignees from the date of the act of bankruptcy—and secondly (as Lord Mansfield expressly puts it in one part of his judgment), that the taking was not lawful, because the goods were *then* the goods of a third person, and so there was a conversion, then is the case of *Potter v. Starkie* in strict accordance with *Cooper v. Chitty*. If, however, the latter case (never denied to be law) can only be sustained by the sheriff having had notice of the bankruptcy when he sold, then the Court of Exchequer, though they agreed with the *decision* in *Cooper v. Chitty*, were opposed to that part of the *reasons* for the judgment; and, in my humble opinion, rightly. Seeing, however, that the decision in *Potter v. Starkie* is of some importance, having been upon a state of facts which completely coincides with the present, I am desirous to furnish your Lordships with the best information that can be

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(*m*) 5 B. Moore, 19.

(*n*) 1 Burr. 20.

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The *Lord Chancellor* :—In consequence of the difference of opinion among the learned Judges, it is necessary that your Lordships should take time to consider this case. I shall merely express our thanks to the Judges for the labour they have bestowed in considering the questions, and I shall then move the postponement of the judgment to a future day.

The further consideration of the case was accordingly postponed.

July 15.

The *Lord Chancellor* :—The question for your Lordships' decision in this case is, how far the sheriff, being called upon to execute a writ of *fi. fa.*, and not having reason to suppose that the defendant, against whom that writ was directed, had committed an act of bankruptcy, and having executed the writ, and it afterwards appearing that at the time of the writ executed there was that which subsequently gave rise to a commission of bankruptcy against the defendant, can set up these circumstances in answer to a claim of the goods seized, made by the assignees appointed under the commission of bankruptcy? This question has of late been much discussed in Westminster Hall, and it is now brought here for your Lordships' adjudication.

There are two points which we have to consider in this case. First, whether the Acts relating to bankrupts have a retrospective effect as against the sheriff? And, secondly, whether anything in the shape of authority can be referred to for the purpose of showing that the sheriff would, in such a case, have been liable at common law. It is said to be necessary to consider the second point, because it has been contended, that the statutes must be construed with reference to the common law, and that the common law was always anxious to prevent the doctrine of relation from taking effect.

statement it will appear that all the acts of the sheriff were completed before he had any notice of the bankruptcy, and before the commission was sued out. It further appears that the exemption of the sheriff *before notice*, was distinctly brought before the Court, upon the plea that he acted only in pursuance of his duty: and, on the other side, the immateriality of notice was pressed; and it was even urged that the observations of Lord Mansfield were entitled to less weight on this particular point, because there was no statement in the case of any notice to the sheriff *in fact*, but that the decision may well be sustained upon the other reasoning to be found in that judgment. It has been observed that those cases, which are supposed to be the foundation of the argument of the Plaintiff in Error, were not brought under the notice of the Court of Exchequer by Sir John Richardson, who was not in the habit of doing things imperfectly. But the protection of the sheriff under the writ was expressly urged by him, and all the cases alluded to were cited and commented upon by Lord Mansfield in *Cooper v. Chitty*, which was itself made the subject of most minute and laborious inquiry and comment in the Court of Exchequer: so that it seems to me impossible that they could have utterly neglected the alleged authorities upon which one principal position contended for before them was made to rest: and the more so, if (as *I believe*) time was taken to consider the deci-

wholly irrelevant; and objected to this supposed *dictum* as not being found in the other reports of *Cooper v. Chitty*; and concluded that the sheriff, having taken goods not mentioned in the writ, but other goods of other persons, was guilty of a conversion, the point of property in the plaintiffs having been conceded early in the argument.

The Court discharged the rule, holding, upon the authority of *Cooper v. Chitty*, that the property must be considered as divested by the bankruptcy.

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[REDACTED]

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unnoticed simply because matters of constant occurrence and continued acquiescence pass without notice or observation, or, in the words of Mr. Justice Richardson, already referred to, "because the law had long been settled, and the case had frequently occurred at *nisi prius* of late years." The next was the case of *Lazarus v. Waithman*, in which the point was decided by the Common Pleas as it had been in the Exchequer. *Price v. Helyar* followed with the same result; and lastly, came the case of *Dillon v. Langley* (q). The report by no means gives an adequate account of the state of fixedness and settlement at which, in the opinion of the King's Bench, the point now under consideration had arrived. I happened to be counsel in the cause, and am not likely very soon to forget what happened; particularly when I learned so soon after what had occurred in the Court of Exchequer, in the very Michaelmas term following, as to the case of *Balme v. Hutton*. I am far from saying that I was prepared with an argument as ingenious as that contained in the elaborate judgment pronounced by Lord Lyndhurst in the Court of Exchequer; but this I must say, that I was prepared with all the authorities upon which reliance is therein placed. Lord Tenterden, however, having first stopped the counsel on the other side, plainly intimated to me that the season for discussion was past; and, accordingly, having barely noticed two of the authorities alluded to, and particularly the main stay of the plaintiff in error, *Bailey v. Bunning*, which then produced no effect in that quarter of Westminster Hall, though it produced so much in another within half a year, against me, I sat down unheard.

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(q) 2 Barn. & Adol. 131.

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I purposely forbear adding to the list of decisions either the case now before your Lordships or that of *Balme v. Hutton*, although the judgment of the Exchequer was reversed by a majority of seven Judges against one. I do so because the doubt which has given rise to them both was first started, I believe, in the case of *Hartley v. Hornby*, tried at Lancaster, at the Spring Assizes in 1829. That was an action for money had and received against the sheriff, who had levied after an act of bankruptcy, but had sold the goods and paid over the proceeds before the commission issued. The question came before the Court of King's Bench upon a motion to enter a nonsuit; and upon the discussion then ensuing the doubt arose to which I have alluded, and a difference of opinion; from which cause, as I presume, the case is not reported. I have, however, procured my brief from the agent of the attorney who instructed me, and there find a very full note of the argument. I shall not trouble your Lordships with any part of it, further than to mention that the learned counsel for the defendant cited and expressly admitted the authority of the before-mentioned cases, establishing the liability of the sheriff in trover, and founded their argument entirely upon the fact that the money had been paid over before notice of the bankruptcy, and that therefore that form of action could not be maintained. So settled up to this time was the question now proposed by your Lordships for our consideration!

I come now to the authorities that are opposed, or supposed to be, to the long train of modern cases expressly and deliberately decided upon the point; the authorities, I mean, already referred to, on which the judgment of the Court of Exchequer mainly rested in the case of *Balme v. Hutton*, and to which, with

some emphasis and appearance of assumed superiority, the title of the *older* authorities has been studiously applied. I am not aware that a case is of necessity better for being old ; nor, I admit, is it worse ; but I make the admission with a material proviso, viz., that it has not been impugned by subsequent decisions ; for, if so, it is. Else, what is meant by expressions (in courts of law not unknown) of decisions over-ruled, and cases no longer law, which compose a list which it would be most inconvenient to enumerate ?

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The first of these old authorities is the case *Bailey v. Bunning*, (reported 1 Lev. 191, also in Siderfin and Keble), and, I may add, is the only case which purports to be in point which has been decided by any court. To what authority this case is entitled, from the state of the reports of it,—how far it is impugned by the *quære* in Siderfin, or its own intrinsic defects,—I will not waste your Lordships' time by inquiring. I can make no addition to the comments which have been made by my learned brothers, with whose opinions upon the main question I agree. I will therefore only say, that, if the fact of notice to the sheriff be not material, and moreover if (as I think) the case of *Cooper v. Chitty* may still be maintained as law, then, in my humble judgment, was this old case over-ruled very nearly three quarters of a century ago, and remained dormant until revived (your Lordships have to determine for what duration) by a decision of the Court of Exchequer in 1831. The second case, *Lechmere v. Thorogood* (r), is not in point. It only decides that trespass will not lie in such case ; which leaves uncontroverted the question whether trover will lie or not, the distinction between them being not quite so

(r) 2 Mod. 236.



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commission notice, and from what time? The day it issues, or within a week, or at what time? I am aware of no authority which establishes that a commission is evidence of itself, and for itself, of the time at which it issues. This at least I know, that, in the case of *Lee v. Lopez* (*t*), where notice to the sheriff was considered material, the point to be ascertained, according to the language of the Court, was, not when the commission issued, as if importing notice of itself, but when the sheriff *had notice* of the commission. If, then, the fact of the commission having issued was to be brought home to the sheriff, like any other fact, upon the statement of the case *it is not*. If, then, there be no facts in the case to sustain the observations, what is the result? Why, that, in my opinion, the judgment may be sustained for *other* reasons which Lord Mansfield has given. In the report of the case in Blackstone, Lord Mansfield is made to say, "that, if the sheriff had sold *immediately* after the seizure, he would have been liable." If he did say so, I think he would have said truly; but I find that it is generally considered to be an error in that report. But, how stands the report of the same case in Burrow? The concluding words of Lord Mansfield in his judgment in the case of *Cooper v. Chitty* have been quoted, and with great reliance:—"The seizure here is after the act of bankruptcy, and therefore after the property was vested in the assignees; but that was excusable, and the sheriff shall not be made liable by relation as a wrong-doer. The gist of this action is, the false return and sale long after the commission and assignment." Passing by the diminished weight of these remarks, from the doubt suggested whether there be

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(*t*) 15 East, 230.

I could not abstain from giving a few observations. I do not think that the law laid down in this case should be altered. I do not think that such an event would be beneficial, and besides, the law has, I am glad to say, undergone a beneficial alteration, but I am unable to come into Court and propose an alteration, there is no great danger that the law can turn to the injury of any one, but for the alteration of the law. But it is of importance that, with a feeling upon a principle adopted, a feeling should be distinctly stated, an actual decision to the actual course of high authority under which the law respects the principle itself, of that principle. I am so convinced of the remarks I have made, that I am compelled to say "not content" to my noble and learned friend.

The judgment of the Court being delivered,
Jenman dissentiente.

I N D E X.

ADVOWSON. See **GRANT.**

AGENT. See **JUDICIAL FACTOR.**

ANNUITIES.

W. C., by indentures, dated in 1800, for the consideration of two sums of 2,000 *l.*, granted unto *G. J.* two annuities of 300 *l.* each, charged on his freehold lands at *T. H.*; and the indentures contained powers of re-purchase by *W. C.*, his heirs and assigns, on giving notice in writing under his or their hands, and paying all arrears.

In 1812, *W. C.* agreed to sell all his lands (including to *T. H.*), to *W. B.* for 90,528 *l.*, and to convey free from incumbrances, except certain mortgages, and in pursuance of the agreement he was let into possession, and paid large sums.

The annuities to *G. J.* being in arrear, in 1818 *W. C.* granted to him all his lands on trust to sell them and pay out of the proceeds, to relieve costs and incumbrances; and, in 1824, *W. C.* assigned to *G. J.* the unpaid balance of the said purchase-money, subject to prior charges, to apply the same in payment of what was stated in account to be due to *G. J.* Nothing was done on these deeds.

W. B. filed a bill in 1825 for specific performance of the agreements with *W. B.*, and for re-purchase of *G. J.*'s annuities, alleging that *W. C.*, at *W. B.*'s request, gave *G. J.* such notice as was required to enable *W. C.*, or *W. B.* in his place, to re-purchase the annuities, and that on the day in the notice mentioned, the agents of *W. C.* and *W. B.* went to *G. J.*'s residence, to pay the principal and arrears with costs, and to tender deeds of transfer for his execution, and *G. J.* being from home, they left a notice that the money and deeds would remain for ten days at the office of one of them. The bill prayed for a declaration that the annuities had ceased from that day.



the assignees all the property that the bankrupt had at the time of what I may call the *crime* committed (for the old statutes consider him as a criminal), and make the sale by the commissioners good against all persons who claim by, from, or under the bankrupt after the act of bankruptcy, and against *all executions* not served and executed before the act of bankruptcy. Dispositions by process of law are put on the same foot with dispositions by the party." The prevailing object was, to prevent and avoid those partial and therefore unjust dispositions of the remnant of their fortunes which men in desperate circumstances (as we learn from the statutes) had been in the habit of making, and which we know men in such a situation are likely to make. Hence the relation to which I am alluding. The case of *Cary v. Crisp* (*x*), cited at the bar for the purpose of showing, that, till assignment, the property remains in the bankrupt, may well be admitted; for, it is in no respect inconsistent. The question is, whose the property is *after* the assignment, and from what date; and upon that question, as no doubt exists, so none was attempted to be raised. The point was admitted. Consequently, as to the first requisite for maintaining the action of trover, I mean property in the goods, the case of the defendant in error is abundantly established.

Next, as to the second requisite for supporting this action—a conversion. Suppose it had been the case of a stranger—an indifferent person—the point, I apprehend, would have been clear: and why? Because it would have been an unauthorized intermeddling with, or, (in the language of the Court in the case of *Jenkins v. Smith* (*y*), when defining a conversion,) "the taking upon him to dispose of the pro-

(*x*) 1 Salk. 118.(*y*) 1 Wils. 328.

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Respondent, without requiring him to present a petition for the purpose.—*Mahon and Others v. Irwin*, p. 559.

APPRENTICE. See **SUNDAY**.

ARMY.

Marriage of officer in. See **MARRIAGE**.

BANKRUPT. See **TROVER**.

A sheriff (before the passing of the 6 Geo. 4, c. 16), having no notice of a previous act of bankruptcy committed by a trader, seized his goods under a *f. fa.*, but withdrew upon an arrangement entered into between the execution-creditor and the trader, receiving, however, his poundage in the ordinary manner. A commission was afterwards issued on this act of bankruptcy.

Held by the Lords (Lord Denman *diss.*) that the assignees might maintain trover against the sheriff for the goods seized.

Seemle, that the receipt of poundage was evidence of a conversion by the sheriff.—*Garland v. Carlisle*, p. 693.

BOND. See **MORTGAGE** and **MORTGAGE ACCOUNTS**.

1. *R.* and *S.*, partners in trade, executed, in the year 1811, four joint and several bonds to *O.*, to secure re-payment with interest of 10,000 *l.* advanced to them by his acceptance, and payment of four bills of exchange, amounting together to that sum. Two of the bonds were made payable in 1817, and two in 1818. *S.* died early in 1815, and his executors agreed with *R.* and with *K.*, who was then in partnership with *R.* in place of *S.*, that *R.* and *K.*, in consideration of the outstanding debts and effects of the former partnership, should pay certain sums to the executors, and should also indemnify *S.*'s estate against certain scheduled debts, including these bonds. No notice of that agreement was given to *O.* He continued to receive interest on the bonds from the new firm as well after as before they became due, and the annual accounts which they furnished to him contained an account of the dividends due to him on 17,000 *l.* stock, which he lent to the new firm. From *O.*'s correspondence with that firm in 1820, it appeared that he had in 1817 given them three years further time for payment of the bonds, and that in 1820, he gave twelve months further time. These indulgences were granted without consent of

operation of the statute of Elizabeth, and that there may be some degree of hardship (if, in truth, that can be used as any argument at all) in such interpretation, all that can be said is, that he shares the same fate with others equally entitled to consideration, or, if the phrase be allowable, compulsive *bonâ fide* payments were to be refunded; harmless and honest dealings were avoided. Against which inconveniences the Legislature, as your Lordships are aware, have very properly and consistently granted relief. But an attempt by the courts of law to do the same, would have been equally inconsistent and improper. In that relief, however, the sheriff is not included. Is he, then, within the words of the statute of Elizabeth, "A person claiming by, from, or under the offender?" It has been contended that he is not: and if by that it be meant to assert that he claims nothing for his own individual use and benefit, the observation is certainly not without truth; but it falls short of the purpose for which it is made. The creditor who sets the sheriff in motion clearly claims "from" the bankrupt: the vendee to whom the sheriff transfers the goods, claims "from or under" the bankrupt, or he gets nothing. Can I, then, say that the sheriff, who is so mixed up with the concerns of the bankrupt, in effectuating the claims of one against him, and transferring the title to another from him, is to be considered, with reference to the statute, as if he stood totally aloof from the transaction; and that, too, when, for the purposes of this action, and in order to constitute conversion in point of law, it is not necessary that any claim should be made for the party's own emolument? This was the very point decided in the case of *Jenkins v. Smith* (z), the special verdict therein

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(z) 1 Wils. 328.



then only is, what has been enacted? I know of no rules of law, or logic either, which can have any bearing upon the subject, except such as may be supposed to aid and assist in the true interpretation of the statute, and the ascertainment of its meaning. Its provisions may be in policy unwise, in theory unjust: but, when a court of law fully perceives and understands what is written, it is ready to give judgment; its duty is complete. If it be clear that the object of the Legislature was, to pursue one main end and object—the vesting property in certain persons, from a by-gone period, by relation, overlooking or disregarding as comparatively immaterial, certain incidental inconveniences consequent upon that relation, of which, for the purposes of the present observations, the liability of the sheriff may be admitted to be one—an attempt to show that such liability ought not to exist, either by the aid of maxims of law, or any other process of reasoning, is quite beside the legitimate purpose of ascertaining the intention of the Legislature. It is argument, not to explain what *has* been done, but to prove what *ought* to have been done—what would have been reasonable, and what just: or, in other words, argument out of time and out of place.

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Upon the whole, upon the weight of authority, and the reason of the thing, if the question had been entirely new, I consider myself bound to give my answer in the affirmative.

Mr. Baron *Gurney* :—The opinion which I have formed on the first question is in favour of the affirmative. This question depends upon the construction of the statute 13 Eliz. c. 7, which empowers the Lord Chancellor, by commission under the great seal, to

seised of the advowson in manner and form as the plaintiff had alleged.—Held, that a fine of the advowson in question levied in 1 Jac. 2. by one whose estate the plaintiff had, was not admissible in evidence under this or any similar issue.

Held that, if admitted, it ought not to be left to the jury to say whether it barred the action of *quare impedit*.—*Ibid*.

EXECUTION. See **TROVER**.

EXECUTORS. See **LIMITATIONS, STATUTE OF.**

GIFT,

J. F., a man of great wealth, and having no children of his own, gave an order on his bankers in October 1821, to advance to *G. M.*, his favourite nephew, such sums of money as they might think prudent, with the opinion of *D. C.*, for the purpose of assisting him to pay in ready money for his goods. In pursuance of this order *G. M.* drew cheques for 6,000 *l.* and 4,000 *l.*, and they were duly honoured. In August 1824 *J. F.* gave the following order on his bankers: "Please to honour such cheques as Mr. *G. M.* may draw for my use," &c. In pursuance of this order also, *G. M.* drew cheques, and they were duly honoured. In April 1826 *J. F.* caused a sum of 20,000 *l.* to be advanced to *G. M.*, who also had from one of *J. F.*'s tenants wool and sheep, the price of which was settled by agreement to which *J. F.* was a party, set off against the rent due to him from the tenant; *G. M.* further received from the partners of *J. F.*, by his direction, a quantity of indigo, and took possession of furniture and other property of *J. F.*, before his death. In a suit for the administration of the estate of *J. F.*, who died intestate, a state of facts was carried in before the Master, under the usual decree for an account charging *G. M.* as debtor to the estate for the 6,000 *l.*, 4,000 *l.*, and 20,000 *l.*, and the prices of the wool, sheep, indigo, and furniture, in answer to which he insisted that all these advances in money and goods were absolute gifts to him and his family from *J. F.*, and that an admission made by him after *J. F.*'s death that the sum of 20,000 *l.* was a loan, had been obtained from him fraudulently by the administrator, and he produced letters purporting to be written to him by *J. F.*, and which, if genuine, would support his answer, but they were charged to be fabricated for the pur-

perty whithersoever it goes, and must have a right of action against any person who converts it; otherwise it is impossible that they can make due distribution among the creditors. In this case, at a period when the fact of the bankruptcy was not known (although it had taken place), the defendant, the sheriff, who was commanded to take the goods of Leonard, the bankrupt, took goods which *had* belonged to Leonard, but which had then ceased to belong to him, and were (as it was afterwards ascertained) the goods of his assignee; and he converted them. The Defendant contends that he is not liable to this action of trover, because he is a public officer; that he was called upon to execute the process of the law; and that at the time he executed it, he had no reason to doubt that the goods which he found in the possession of Leonard were his property. I admit the hardship, and regret that it exists. But the Legislature has not made any exception in favour of a public officer under these circumstances; and I think that a court of law cannot supply that omission. This is the best opinion that I can form upon the Act of Parliament itself. And this would be my judgment were the case *res integra*.

The next question is, whether this Act of Parliament has in all times received a contrary exposition. If an Act of Parliament more than two centuries old has received one uniform construction, it would perhaps be more safe to yield to that construction (even though it should not be quite satisfactory), than, by making a change, to unsettle the opinions and the practice of the profession and of the public. But I do not find the stream of authority so uniform as to compel me to adopt a construction of this statute at variance with my own conviction. On the contrary,

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I find the cases and the practice, for a period of nearly eighty years, in favour of the construction which I have given: and the older cases, upon which reliance is placed for the opposite construction, appear to me to have been of doubtful authority.

The first case which is relied upon in favour of the Plaintiff in Error, is *Bailey v. Bunning* (a), very imperfectly and confusedly reported. [The learned Judge having examined that case, and the cases of *Lechmere v. Thorogood* (b), and *Cole v. Davies* (c), proceeded]. These cases appear to me to be but slender authority for deciding that the sheriff shall not be answerable for converting the property of the assignees of the bankrupt, under a warrant to levy on the goods of the bankrupt. The last of these cases occurred in the year 1698, and there does not appear to me to be anything to fill up the chasm between that case and the case of *Cooper v. Chitty*, which was decided in the year 1756. The case of *Cooper v. Chitty* was twice argued: and Lord Mansfield, assisted by Justices Dennison, Foster, and Wilmot, delivered an elaborate judgment upon it. It is reported by Burrow, Blackstone, and Lord Kenyon; and I think the report by Lord Kenyon is the most distinct and satisfactory. The facts of the case of *Cooper v. Chitty* differ from the facts of the case before your Lordships, inasmuch as the conversion was after the bankruptcy; but the value and the importance of the case consists in this, that the whole doctrine upon the subject of bankruptcy being amply discussed, Lord Mansfield illustrated with great perspicuity the distinction between *trover* and *trespass*, a misapprehension respecting

(a) 1 Lev. 191; 1 Sid. 271; 2 Keb. 32.

(b) 3 Mod. 236; 1 Show. 12.

(c) 2 Ld. Raym. 724.

to daughters in tail, and in default of issue, to his wife for life, in lieu and discharge of dower, and of all provision made for her by his own or his father's will, with divers remainders over. He then gave a great number of pecuniary legacies, some to be paid in any event, and with interest, others to be paid only in the event of his leaving no issue, and not expressed to bear interest; and, of these latter, some were directed to be vested in stock for the benefit of relations for life, remainder to their children. And after directing that all the legacies should bear interest from the time they should become respectively *payable*, and be raised and paid accordingly, he charged the estates and premises comprised in the term with payment of such debts and legacies in case of the insufficiency of his personal estate, and he directed the trustees to raise the same, pursuant to the trusts vested in them for that purpose.

The testator died without issue: his personal estate was exhausted in paying debts and the legacies that were directed to be *in any event*, and which were declared to have priority. The questions were, When were the other legacies to bear interest, and how was it to be paid?

Held, that the unpaid legacies were well charged on the lands comprised in the term, but not to be raised until after the death of testator's wife, and that interest on them should be paid during her life out of the rents and profits of the said lands.—*Earl of Milltown v. Trench and Others*, p. 276.

2. *B.* mortgaged certain premises to *L.* The premises were required to be partly pulled down and rebuilt. *P.* undertook to perform the work, but required security for the payment. An agreement was entered into between *B.*, *L.* and *P.*, by which *L.* consented to become tenant of part of the premises when rebuilt, and to take a lease of them from *P.*, to whom *B.* had assigned his interest for a term of years, and to pay *P.* 1,000 *l.* for the lease and 250 *l.* a-year for rent. The premises having been rebuilt, *L.* entered into possession, but as no lease was granted by *P.*, did not pay the 1,000 *l.* nor the 250 *l.* a-year rent. In a suit afterwards instituted by *P.*, and to which both *B.* and *L.* were parties, Held, that the accounts of what was due to *L.* on the mortgage were not to be taken with annual rests, as the accounts on the other side could not be taken in the same manner, either as



Held, by the House of Lords, that this latter order was inconsistent with the principles of an interpleader suit; that the plaintiffs in that suit having paid into Court under its order the whole sum which was the subject of interpleader, were discharged from further obligation; that the protracted litigation which increased the claim of one of the conflicting defendants beyond the sum in Court, being caused not by the plaintiffs, but by the other conflicting defendants, who were parties to the appeal, and the money being paid to them, and never having been the subject of the interpleader suit, they were the parties really liable to satisfy the claim established by C., with costs.—*East India Company v. Campion and Others*, p. 616.

JOURNALS. See EVIDENCE.

JUDICIAL FACTOR.

In a creditor's suit a Scotch Court is not bound to appoint a common agent, but may entrust the performance of his duties to the hands of a judicial factor.—*Hamilton v. Littlejohn*, p. 20.

LEGACIES. See INTEREST, 1.

LEGITIM. See ESTATE, 2.

LIMITATIONS, STATUTE OF.

A debt which, at the death of the testator is not barred by the Statute of Limitations, may become so afterwards as to the executors and legatees, notwithstanding a charge by the testator of his debts upon his personal estate; nor will the operation of the statute be prevented, though the testator, erroneously supposing part of his personal estate to be real estate, has so described it in his will, and charged his debts upon it.

An executor's advertisement to creditors, to send in an account of their claims for examination, does not amount to a promise sufficient to revive a debt already barred by the Statute of Limitations.—*Scott v. Jones*, p. 382.

LOAN. See GIFT.

MARRIAGE. See INSPECTION OF DOCUMENTS.

The marriage of an officer celebrated by a chaplain of the British army within the lines of the army when serving abroad is valid, under the 4 Geo. 4, c. 91, though such

army is not serving in a country in a state of actual hostility, and though no authority for the marriage was previously obtained from the officer's superior in command.—*Waldegrave Peerage*, 649.

MARRIAGE PORTION. See *ESTATE*, 2.

MASTER AND APPRENTICE. See *SUNDAY*.

MORTGAGE AND MORTGAGE ACCOUNTS. See *ANNUITIES*. *INTEREST*, 2, 3.

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The Irish firm in which *G. R.* was partner became insolvent in 1804, owing *N. & Co.* upwards of 120,000*l.* in respect of transactions, some of which were prior in date to *G. R.*'s partnership. In the accounts of these debts produced by *N. & Co.*, the sum of 10,000*l.* secured by the bonds of *G. R.* was charged against the firm. A composition was entered into for 42,000*l.*, whereof 10,000*l.* were to be paid by *G. R.*, who gave a mortgage on his estate to secure the same. The remaining 32,000*l.* were otherwise secured, and thereupon *N. & Co.* executed a release to the firm, releasing them and *every or any of them* from all claims or demands by *N. & Co.*

Held by the Lords (reversing on a former appeal a decree of the Lord Chancellor of Ireland), that the said mortgage was not a substitution for the securities by the bonds, &c., and that the release did not extend to the balance due on the bonds.—*Noel v. Rochfort and Others*, p. 158.

NOTICE. See ANNUITIES. APPEALS, 1.

PARENT AND CHILD.

A ward of Court, entitled in her own right to large real and personal property, was married under age, and without the consent of the Court, which marriage was subsequently annulled. Upon her coming of age, the husband petitioned to be at liberty to make proposals for a settlement of her property, and to have a legal marriage celebrated; undertaking to execute such settlement as the Court should direct, and to do whatever the Court should order in that behalf. The petition being granted, a legal marriage was solemnized, and proposals were laid before the Master, who approved of a draft of settlement, whereby all the ward's property was limited to her for life, for her sole and separate use, with power of appointment of part of it, and afterwards to her children; but the Lord Chancellor declined making any order as to the execution of this settlement, the amount of the property not being ascertained. Of the marriage thus lawfully solemnized there was issue two children. The wife afterwards eloped; the husband petitioned the Court for maintenance for the children out of the property, stating that his own means were not sufficient.

Held, that the children had no right in law or equity, during the life of their mother, to be maintained out of her separate estate.

Held also, that the proposed settlement, though not executed, having been acted upon by the Court by several orders could not be varied.—*Hodgens v. Hodgens*, p. 323.

PATENT. See EVIDENCE.

PEERAGE-PATENT. See EVIDENCE.

"PORTIONIBUS."

This word is properly employed to mean a portion of the tithes of one parish claimed by the rector of another parish, and will not of itself be taken to have any other meaning.—*Scarlet v. The Governors of Lucton Free School*, p. 1.

PRACTICE. See **APPEALS.**

A settlement framed by the order of the Court, though not actually executed, was acted upon by the Court, by several orders made in the cause in which such settlement was directed.—Held, that it could not afterwards be varied.—*Hodgens v. Hodgens*, p. 323.

PRINCIPAL AND SURETY. See **SURETY.****QUARE IMPEDIT.**

A plaintiff in *quare impedit*, after tracing his title through various steps, and averring the death of *W.*, who had been shown to be a joint tenant with the plaintiff of a term of years in an advowson alleged, “whereupon and whereby the plaintiff became and still is possessed of the said advowson as of an advowson in gross for the remainder of the said term so theretofore granted.” The defendant pleaded that he, as Bishop of *M.*, was seised of the advowson in gross in right of his see; without this, that the plaintiff was possessed of the advowson in manner and form as the plaintiff had alleged.—Held, that a fine of the advowson in question, levied in the 1st of James 2, by one whose estate the plaintiff had, did not bar the action.—*The Bishop of Meath v. The Marquis of Winchester*, p. 445.

RESTS. See **INTEREST, 2. MORTGAGE ACCOUNTS.****SAVINGS' BANKS.**

By the 22d sec. of the Act 9 Geo. 4, c. 92, an Act to consolidate and amend the laws relating to savings' banks, it was ordered, that within six weeks after the 20th of November 1828, the trustees and managers of the different savings' banks then established, should ascertain the amount of the increased funds of their respective banks up to the said 20th of November, and should as soon afterwards as conveniently could be, after retaining so much as might be necessary for the future management of the said savings' banks respectively, appropriate the same in the manner provided for by their respective rules and regulations made before the passing of that Act; or in the event of no provision having been made by such rules and regulations, then in such manner as the trustees or managers, or the major part of them, at any general meeting convened according to the respective rules and regulations of such

savings' banks, should think fit. The increased fund of the Arundel Provident Bank (established in 1818), up to the 20th of November 1828, was ascertained to amount to 742*l.* 15*s.* 11*d.*

The rules and regulations of the bank did not contain any direction as to the mode of applying this surplus, but by one of the rules, and also by the said Act, the trustees and managers were not to have any benefit from the application of it. Previous Acts, repealed and consolidated by this Act, provided that the surplus should be disposed of among the depositors, as the trustees should think fit. The majority of the trustees of the Arundel Provident Bank, present at a general meeting regularly convened, resolved to appropriate 592*l.* 15*s.* 11*d.* of the surplus to the widening of the bridge on the river Arun, and the same was paid over accordingly to one of themselves, who was bridge-master.

Held by the Lords (affirming an order and decree of the Court below), that this was a misapplication of the fund, and a breach of trust; and though the money was expended on the bridge, the parties were personally liable to refund it.—*Holmes v. Henty, and Others*, p. 99.

SETTLEMENT. See PARENT AND CHILD.

SHERIFF. See TROVER.

"STERLING." See BOND, 2.

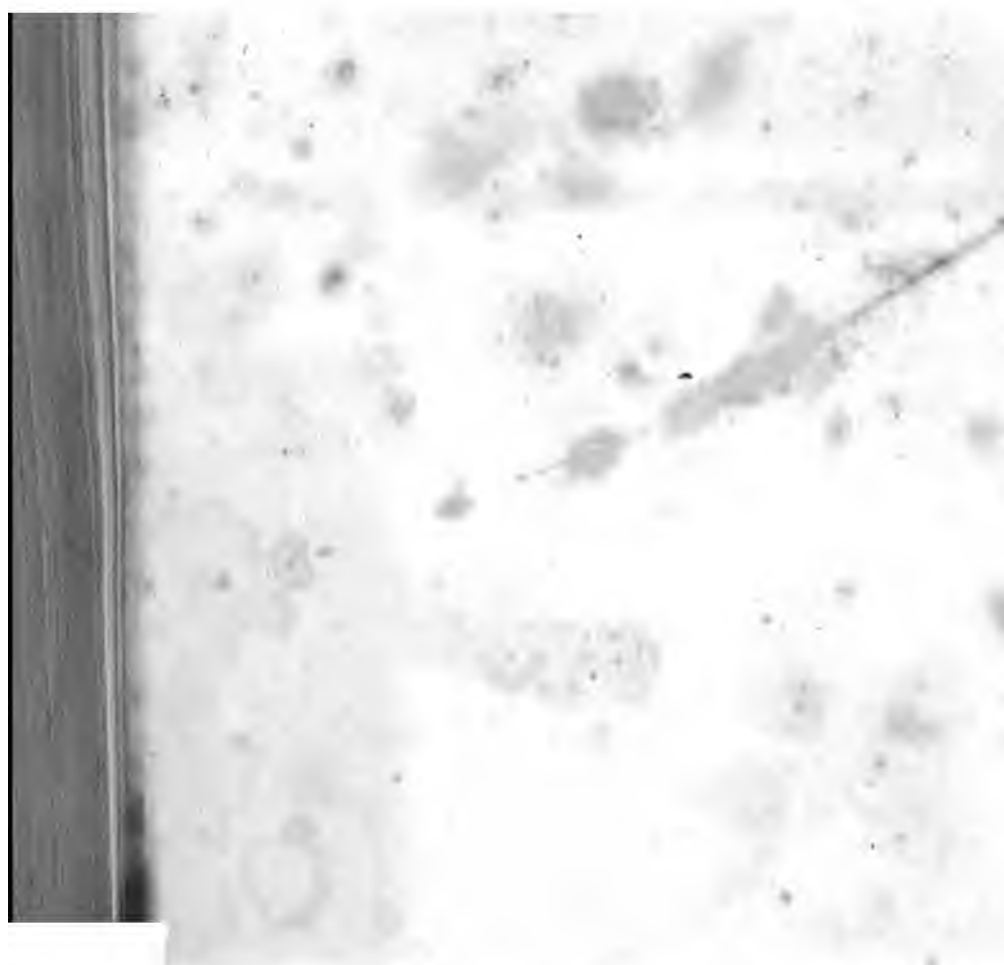
SUNDAY.

An apprentice to a barber in Scotland, bound by his indentures "not to absent himself from his master's business on holiday or week-day, late hours or early, without leave," went away on Sundays without leave, and without shaving his master's customers.

Held by the Lords (reversing interlocutors of the Court of Session), that the apprentice could not be lawfully required to attend his master's shop on Sundays for the purpose of shaving the customers, and that that work and all other sorts of handicraft were illegal, in England as well as in Scotland, not being works of necessity, or mercy, or charity.—*Phillips v. Innes*, p. 234.

SURETY.

The conduct of the principals, creditor and debtor, with respect to a money bond, will not affect the rights and liabilities of



1st of May then next, to make out a good title. *A.* was to be entitled to the rents and profits of all and singular the messuages, &c., from the 1st of May then next, or from such time as the said purchase should be completed. *A.* had at the time of making the agreement paid part of the purchase-money, and he promised, for the considerations aforesaid, that he would, on the said 1st of May, pay the remainder as and for the absolute purchase, &c. *A.* further agreed to pay all and every such sum and sums of money for the increased value of the said messuages, &c., by or in consequence of the deaths of any persons for whose life or lives any of the messuages were theretofore granted. The purchase was not completed for a very considerable period. The vendor filed his bill for a specific performance. The Court made a decree, referring it to the Master to inquire when the vendor could make a good title, and how much the value of the estate had been increased by the deaths of the persons on whose lives any portions of it were holden.—Held that this decree was correct, and that the contract did not give the vendor a right to demand payment for the increased value of the estate from the wearing as well as the dropping of lives.—*Brooke and Others v. Champernowne and Others*, p. 559.

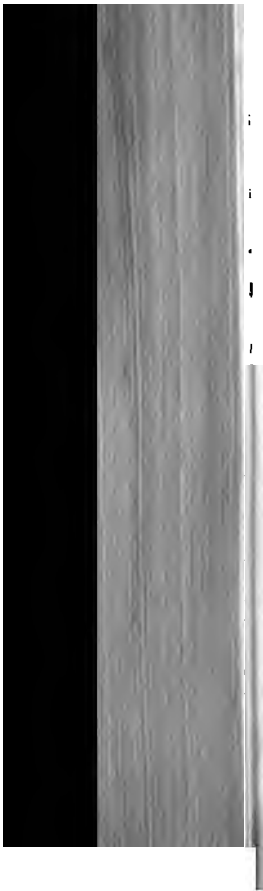
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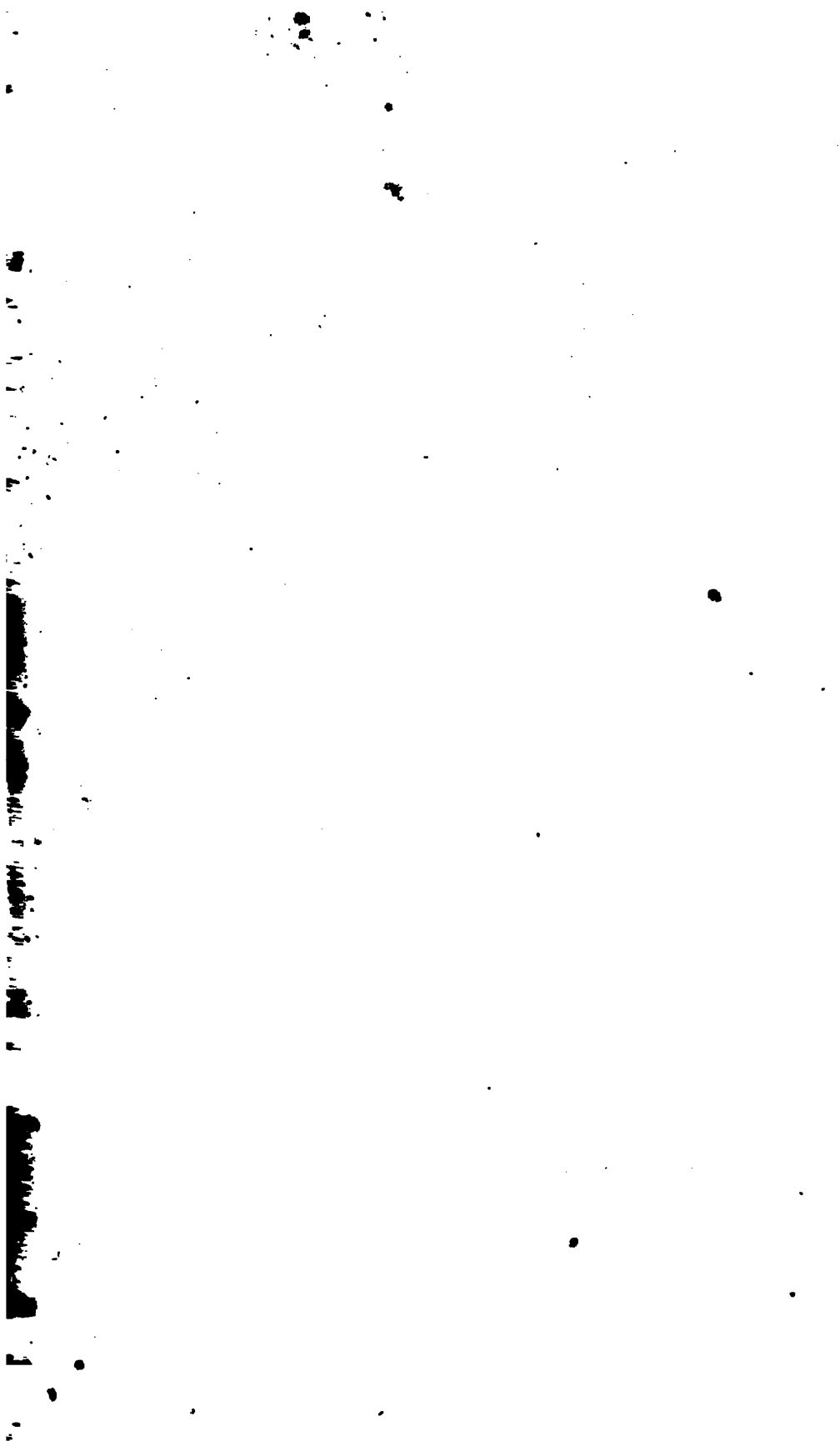
Page 9, line 17, and p. 11, line 2, *for Mee read Meade.*

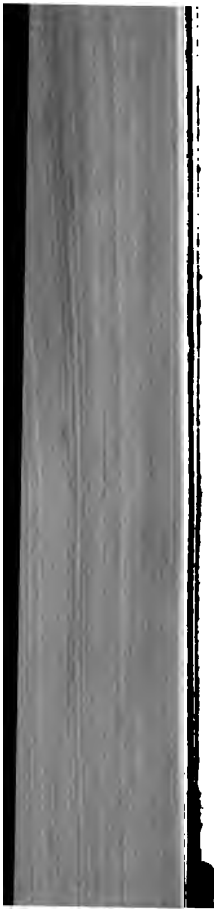
Page 13, line 1, *for quære read quare.*

Page 323, in the head-note, *for* "of the second marriage there was issue of the marriage two children" *read* "of the marriage thus lawfully solemnized there was issue."

Page 649, in the head-note of the Waldegrave Peerage, *for* 9 Geo. 4, *read* 4 Geo. 4.







of the bankrupt, is a person who claims by or under the bankrupt; and, where the proceedings are subsequent to the act of bankruptcy, that he claims "by or under the bankrupt, by an act done after the bankruptcy." For if we were to confine those words to voluntary acts done by the bankrupt himself, we should in the first place violate their most simple and plain meaning; and, secondly, the more limited construction thus adopted would equally enable the execution creditor to hold the goods, which would be contrary to the policy of the law; and thirdly, it would equally exonerate the sheriff, if he acted after he had notice of the act of bankruptcy, and even of the commission itself. In addition to these reasons, I may also rely on the authority of Lord Mansfield, in *Cooper v. Chitty*, where he says, "Dispositions by process of law are put on the same principle with dispositions by the party; to be valid, they must be completed before the act of bankruptcy;" and of Lord Hardwicke, in *Billon v. Hyde* (2), where he says: "By the act of bankruptcy, all the real and personal estate vested in the assignees, and the property vested in them from the time of the act committed; and that may go back to a great length of time, and it overcharges all those acts, without regard to the fairness or fraud in them. So that a sale of goods by the bankrupt after the act committed is a sale of their property, for which they may maintain trover. So it is as to the payment of money; and this was the intent of the Act Jac. 1, c. 19, s. 14, being, that this shall not extend to the prejudice of any debtor of the bankrupt who paid his debt after the act committed, without knowing of it. This re-

1837.
 GARLAND
 v.
 CARLISLE.

(2) 1 Ves. sen. 328.





